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NAMES OF COMPANIES.—I.

On several recent occasions the time of the judges of the Chancery Division of the English High Court of Justice has been occupied in considering cases in which one company has complained of the assumption of a particular name by another company, and has endeavored to restrain the assumption of that name on the ground that it was so closely assimilated to that under which the complaining company had for some length of time existed, as to be intended or calculated to attract to the more recent company business intended for the older one. And on such occasions the contention, of course, has been that the new company was not merely entering into a fair competition with the existing company in that line of trade, but that it was taking a name calculated, by deceiving the public as to the identity of the company, to attract business intended for the complaining company in particular. It may not be out of place to offer some remarks on this subject.

The earliest reported case in which the matter appears to have been brought before the court was London and Provincial Law Assurance Society v. London and Provincial Joint Stock Life Assurance Company,[1] in which the Vice-Chancellor of England, Sir Lancelot Shadwell, in the year 1847, expressed a very decided opinion as to the principles on which the court should act in such cases. "The principles, I apprehend, are clear" said he, "that the court will always have regard to this, whether there has been such an exclusive right to a name on the part of the plaintiffs as to justify the court in interfering in a summary way against the defendants; and the court will consider whether, taking all the names together, it is or is not apparent that there is such a deceptive quality as is likely to produce the injury complained of." The points, then, to which the Vice-Chancellor thought the court ought to have regard were two—first, whether the plaintiff company had an exclusive right in the name under which it was carrying on business; second, what was the degree of resemblance between that name and the name assumed by the defendant company. Whether the plaintiff company has or has not an exclusive right in its name appears to depend on two further inquiries—whether the character of the name is favorable to the acquisition of an exclusive right, and whether the name has been used under such circumstances as to have caused the right which could be acquired to have actually been so acquired.

While it would be too much to say that under no circumstances can a name, composed of mere common and descriptive words, be capable of protection, it seems beyond doubt that a fancy name, the more inappropriate the better, is far more likely to acquire a special reputation for the company which is known by it. "One can well understand," said the present Master of the Rolls, in Merchant Banking Company v. Merchants' Joint Stock Bank,[2] "a certain fancy name being so attached to a business as to indicate that business and that business alone, and that another man using the same fancy name in carrying on a similar business might be convicted of an intention to defraud from that circumstance alone." On the other hand, the court does not view with favor an attempt to acquire an exclusive right in a word in common use, used in its ordinary and appropriate signification, for if such attempts were frequently successful it might not impossibly come to pass that companies might exist whose line of trade could not be discovered from their names, the properly descriptive words having been already monopolized by other companies before them in the field. So in Colonial Life Assurance Company v. Home and Colonial Assurance Company,[3] Lord Romilly, M. R., refused to restrain the use of its name by the defendant company, on the ground that the object of the motion was to obtain a monopoly of the word "colonial," which object his lordship declined to assist. And in the last case on the subject, Australian Mortgage, etc. Finance Company v. Australian and New Zealand Mortgage Company,[4] Court of Appeal, January 17, 1880, Lord Jus-

[1] 17 L. J. Ch. 37.

[2] 26 W. R. 847, L. R. 9 Ch. D. 560.

[3] 12 W. R. 783, 33 Beav. 548.

[4] Court of Appeal, January 17, 1880.

tice James stated that, in his opinion, a company could not appropriate to itself a name which, as in that case, merely described the nature of the business or the locality of the operations.

For a name to be protected, it is not sufficient for it to have been suggested, or advertised, or talked of, it must have been actually used. In the well-known common law case of Lawson v. Bank of London,[5] the omission of an averment in the declaration that the plaintiff had ever carried on the business of a banker at his bank, for which he claimed the monopoly of the title subsequently assumed by the defendants, was held, on demurrer, to be fatal to his success, though the court appears to have thought that, if the necessary averment had been made, the plaintiff might quite possibly have succeeded. And the decision appears to be not only law, but justice, for if the company had never done business with any one, the name could not be connected by the public with the company for business purposes; so that no one would suffer by the subsequent use of the name by a later company, neither the former company nor the public. In the earlier cases (London and Provincial Law Assurance Society v. London and Provincial Joint Stock Life Assurance Company and Purser v. Brain,[6]) the Court of Chancery appears to have thought that some length of user by the plaintiff company was required in order for it to be able to obtain protection for the name, but in Lee v. Haley,[7] Vice-Chancellor Malins said that, "directly the name [of a shop or inn] is established so as to constitute a reputation, no person can adopt the same name, (which, although not a copyright, is in the nature of a trade-mark) because, by doing so, he leads the public to believe that they are dealing with the party who has established the name, when, in truth, they are dealing with another person." This appears to be the rule which the court is disposed to follow, and so long as business has actually been carried on under the name in question, it does not seem that minute inquiries will be made with respect to the exact time for which the business has been carried on, or the dimensions to which it has attained.

[5] 4 W. R. 481, 18 C. B. 84.
[6] 17 L. J. Ch. 41.
[7] 18 W. R. 181.

From the terms employed by Sir Lancelot Shadwell in the case first cited, it might be supposed at first sight that the right to protection in respect of the name of the company was, in fact, a right of property in the name. But this has been decided not to be so. Lord Justice Giffard, in Lee v. Haley,[8] says, "I quite agree that the plaintiffs have no property in the name [Guinea Coal Company], but the principle upon which the cases on this subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade and carries it on under a given name, that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who had given a reputation to the name." And in the same judgment the lord justice says again: "It is a fraud on the part of a defendant to set up a business under such a designation as is calculated to lead, and does lead, other people to suppose that his business is the business of another person."

However, although it is not a right of property which is protected in the name of a company, there is not much difference in the result; for it is not necessary for there to have been an actual fraudulent intention on the part of the defendants, so long as what they have done was calculated to produce the results of fraud, though unintentionally. "What the law did prevent was fraud; and it prevented, not only actual fraud—that is, fraud intentionally committed, but it also prevented a man from carrying on business in such a way, whether he knew it or not, as to represent that his business was the business of another man." Per Jessel, M. R., Merchant Banking Company of London v. Merchants' Joint Stock Bank. And the same principle was clearly laid down in the Supreme Court of Connecticut (Holmes, Booth & Haydens v. Holmes, Booth & Atwood Manufacturing Company,[9]) by Mr. Justice Carpenter who expressed himself thus: "The ground on which courts of equity afford relief in this class of cases is the injury to the party aggrieved, and the imposition upon the public,

[8] 18 W. R. 242, L. R. 5 Ch. 155.
[9] 37 Conn. 278, 9 Am. Rep. 324.

by causing them to believe that the goods of one man or firm are the production of another. The existence of these consequences does not necessarily depend upon the question whether fraud or an evil intent does or does not exist. The *quo animo*, therefore, would seem to be an immaterial inquiry." And see Singer Manufacturing Company v. Wilson, in the House of Lords.[10]

THE FOURTEENTH AND FIFTEENTH VOLUMES OF THE AMERICAN DECISIONS.

The last two volumes of this important undertaking demonstrate what the previous volumes suggested, namely, that under Mr. Freeman's supervision, the work is becoming more valuable than ever. So far as the selection of cases is concerned we can see no great difference between his system and Mr. Proffatt's, but in the number of cases annotated the difference is very marked. Anyone who has been in doubt concerning the utility of this work need only look over the notes to the two volumes before us, in order to see that as a collection of American leading cases, and case law generally, it is without a rival.

The fourteenth volume contains cases from thirteen States and from seventeen volumes of reports, covering four years, from 1823 to 1827. One hundred and forty-six cases appear in full, of which seventy-eight, or more than half, are annotated. The subjects which are discussed at most length in the notes are the following: Breach of covenant of warranty; bail bonds; execution of power by attorney; repeals of statutes by implication; alteration of negotiable paper; merger of civil injury; agreements to arbitrate; fixtures; liability of erector of nuisance; abuse of process; letters of credit; amendments; writ of *ne exeat;* color of title; malicious prosecution; voluntary conveyances; *lis pendens*. Among other novel cases we note the following: Selling unwholesome provisions is indictable at common law. *State v. Smith*, 3 Hawks, 378. An action will not lie by a parent for procuring his child's marriage without his consent. *Jones v. Tevis*, 4 Litt. 25. A note given in consideration that the payee will give the maker his interest in an ensuing election for sheriff, is void. *Swayze v. Hull*, 3 Halst. 54. In *Snowden v. Noah*, 1 Hopk. Ch. 347, the defendant was the editor but not the proprietor of a newspaper called the *National Advocate*, and immediately after the sale of the establishment by its former proprietor to the complainant, the defendant established another newspaper under the title of the *New York National Advocate*. He sent the new paper to the subscribers of the *National Advocate*, and was soliciting the support of its patrons. Under these circumstances an injunction was asked and denied. The chancellor said: "The business of printing and publishing newspapers being equally free to all, the loss to one newspaper establishment which may follow from the competition of any rival establishment is merely a consequence of the freedom of this occupation, and gives no claim to legal redress. But a newspaper establishment is also a subject of property; and so far as the rights of such an establishment are private and exclusive, this species of property, like any other, is entitled to the protection of the laws. The material property of the *National Advocate* is not here in question. * * * * The subject in respect to which an injunction is asked, is what is called the good will of the establishment, or the custom and support which the *National Advocate* had before received from its subscribers and patrons or from the public. The effort of Noah is to obtain for his newspaper the support of the public in general, and especially the custom and good will of the friends of the *National Advocate*; this object is distinctly avowed, and an open appeal is made to the friends of the *National Advocate* and to the public, to give their support to the newspaper. * * * * An open appeal made to the public in favor of the new journal, as a new and distinct paper, seems to remove from this case every objection. Noah is at liberty to invite the subscribers and patrons of the *National Advocate* to give him their support, and they are entirely free to accept or reject this invitation. They, like others, may give their support to either, or neither, or both of these papers. The only circumstance in this case which has any appearance of undue encroachment upon the rights of Snowden is that Noah's newspaper is published under a name nearly the same with that of Snowden. But the name of the new paper is sufficiently distinct from the name of Snowden's paper to apprise all persons that those are really different papers. These different titles and the different matters which must appear in two daily gazettes, seem to afford all the information which can be desired by those who claim to give their patronage to either of these papers. I do not perceive that any person can be misled in this respect, and the whole case seems to be nothing more than an open competition between two newspaper establishments, for the good will of those who were the patrons of the first establishment and for the favor of the public. * * * * It appears to me that every person who is disposed to patronize or support the *National Advocate* may do so, without being deceived or misled by the existence or publication of the *New York National Advocate*. The struggle of these parties seems to be merely a competition, in which there is no imposture or deception."

The cases in the fifteenth volume—one hundred and sixty in all, of which eighty-nine are annotated—are taken from fifteen volumes of reports representing ten different States. They cover two years, from 1824 to 1826. The cases which have been fully annotated by the editor are upon the

[10] 26 W. R. 664, L. R. 3 App. Cas. 376.

The American Decisions, containing all the cases of general value and authority in the courts of the several States, from the earliest issue of the State Reports to the year 1869. Compiled and annotated by A. C. Freeman. Vols. 14, 15. San Francisco: A. L. Bancroft & Co. 1880.

following topics: Merger; impeachment of witness; fraudulent concealment in sales; proof of will; power of agents; conversion; informalities in official bonds; books of account as evidence; divorce; doctrine of relation; specific performance; champerty and maintenance; compensation for improvements; contracts of lunatics; joinder of defendants in equity; distress; tax-sales; confusion of boundaries. The following decisions attract our attention in turning over the pages of this volume: A cashier's bond conditioned for "the faithful discharge of the duties of his office" is broken by any violation of any valid by-law of the corporation. *Bank of Carlisle v. Hopkins*, 1 T. B. Monroe, 245. Re-enacting into a code the general provisions of prior laws does not repeal the exceptions to which these general provisions were subject. *Miller v. Mercier*, 3 Mart. 236. A stage-coach is liable to attachment though the horses are hitched on, the passengers being not yet seated, or if it has reached its destination, though two passengers yet remain in it to be carried to their residences. *Potter v. Hall*, 3 Pick. 368. The opinion of witnesses as to whether plaintiff was attached to defendant are admissible in an action for breach of promise of marriage. *McKee v. Nelson*, 4 Cow. 355. A dog which attacks persons or kills sheep may be killed by any one as a nuisance. *Hinckley v. Emerson*, 4 Cow. 351. Eligibility for office may be taken away from a citizen as a punishment for crime. *Barker v. People*, 3 Cow. 686. The word "thief" is not *per se* actionable (*Brite v. Sill*, 2 T. B. Monroe) nor words imputing adultery to a married woman. *Smalley v. Anderson*, 2 T. B. Monroe, 56.

ACTION AGAINST OFFICER—LIABILITY OF TAX COLLECTOR FOR FALSE RETURN.

RAYNSFORD v. PHELPS.

Supreme Court of Michigan, April, 1880.

R held a mortgage on lands on which a tax was assessed for the year 1874. P, the tax collector, falsely made return that there was no personal property upon the land, and the tax becoming thereby a lien thereon, R was forced to redeem. *Held*, that P was liable to R for the money paid by him.

Error to Kent County.

C. G. & W. W. Hyde, for plaintiff in error; *Simonds & Fletcher*, for defendant in error.

COOLEY, J., delivered the opinion of the court:

It was decided in Royoming v. Goodchild, 2 W. Bl. 906, that a public officer having ministerial duties to perform in which a private individual has a special and direct interest, is liable to such individual for any injury sustained by him in consequence of the failure to perform such duties. It was an officer connected with the postal service who was held liable in that case, and the decision is followed in this country. Teall v. Felton, 1 N. Y. 537; s. c. in error, 12 How. 284. Election officers have been held liable on the same ground (Ashby v. White, Lord Raym. 938; 1 Salk. 19; Lincoln v. Hapgood, 11 Mass. 350; Jeffries v. Ankeny, 11 Ohio, 372); and so have commissioners of highways (Hover v. Barkhoof, 44 N. Y. 113; Hathaway v. Hinton, 1 Jones, N. C. 243); and so have inspectors of provisions (Hayes v. Porter, 22 Me. 371; Nickerson v. Thompson, 33 Me. 433; Tardos v. Bozant, 1 La. Ann. 199); and so have tax and other officers. Amy v. Supervisors, 11 Wall. 136; Tracy v. Swartwout, 10 Pet. 80; Brown v. Lester, 21 Miss. 392; Bolan v. Williamson, 1 Brev. 181. It is immaterial that the duty is one primarily imposed on public grounds, and, therefore, primarily a duty owing to the public. The right of action springs from the fact that the private individual receives a special and peculiar injury from the neglect in performance, which it was in part the purpose of the law to protect him against. It is also immaterial that a failure in performance is made by the law a penal offense. Hayes v. Porter, 22 Me. 371. The exceptions are of those cases in which the functions of the office are judicial, or partake of the judicial. Sage v. Laurain, 19 Mich. 137; Goetcheus v. Matthewson, 61 N. Y. 420; Bevard v. Hoffman, 18 Md. 479; Harrington v. Commrs. etc., 2 McCord, 400. But even in these cases the officer is responsible if he acts maliciously. Gordon v. Farrar, 2 Doug. (Mich.) 411; Bennett v. Fulmer, 49 Pa. St. 82, 157; Gregory v. Brooks, 37 Conn. 365; Strickfadden v. Zipprick, 49 Ill. 286.

The principle is as familiar as it is sound. It is, nevertheless, insisted that the present case is not within it. Tax collectors, it is truly said, are chosen because the machinery of government must be kept in motion, and to that end it is essential that the public revenue should be collected. They are chosen, therefore, and their duties imposed on public grounds, not on private. If, through any negligence on the collector's part, the State loses a portion of its dues, the officer is responsible to the State for the loss; but it is denied that he owes any duty to individuals except to abstain, as every citizen must, from committing trespasses on their rights. The question of negligence in the performance of public duties must always concern the public good.

But, conceding that the law creates the office of collector in order that public revenues may be collected, it does not follow that it leaves that officer at liberty to disregard private interests in their collection. When the law prescribes who shall be liable for the payment of taxes, and whose property may be levied upon therefor, it at the same time, by implication, forbids the officer to seize upon the property of others, or, by act or omission, make the tax a charge upon such property. The implied prohibition creates a duty in favor of the person whose property is the subject of it, and he is at liberty to buy and sell in reliance upon the duty being performed. He has a right to understand that the officer is commissioned by the law to act only with due respect to the rights of individuals, and that if he acts otherwise and causes special injury, he disobeys

his commission, and is not within the protection the commission might otherwise give.

The plaintiff owned a mortgage on lands on which a tax was assessed for the year 1874. A warrant was issued for the collection of this tax, and was placed in the hands of defendant for service. The plaintiff's case is that during the life of this warrant, and while the defendant held it, there was personal property upon the land, belonging to one French, who had purchased the equity of redemption after the first Monday of May and before the first Monday of December of that year, from which it was the duty of defendant, under the express provisions of the statute, to make collection. Comp. Laws, § 1006 Instead of performing this duty he falsely made return of no goods, whereby the tax became established as a lien upon the land, and the land was sold for its satisfaction. Meantime the plaintiff had foreclosed his mortgage and became owner of the lands, and was compelled to redeem from the tax sale.

Is the plaintiff wronged by this false return? We think he is. It was his legal right that the goods of French should be sold to satisfy the tax, and the law always intends that legal rights shall be respected. Moreover, he alone suffered injury from the false return. The public suffered nothing, for the lien on the land remained and was enforced, and the only injurious consequence of the misfeasance in public office was that the tax was collected from one man, when the command of the law was that it should be collected from another.

If there is no wrong without a remedy, then it would seem that this action should be supported, for the defendant is the only wrong-doer. It may be suggested that the plaintiff might have a cause of action against French for money paid to his use, but this is not clear. The statute does not make the purchaser of land, under such circumstances, personally liable; it only renders his property subject to seizure during the life of the tax warrant. Payment by defendant did not release the property of French, for it was released by the neglect of the officer which is complained of in this suit. The general rule is that taxes can only be enforced by means of the statutory remedies. Crapo v. Stetson, 8 Met. 393; Shaw v. Peckett, 26 Vt. 482; Camden v. Allen, 26 N. J. 399; Packard v. Tisdale, 50 Me. 376; Carondelet v. Picot, 38 Mo. 125. But whether or not the rule applies here is immaterial, as this action, in either case, is well grounded on common law principles.

The judgment must be reversed, with costs, and the cause remanded, with leave to defendant to withdraw his demurrer and plead on payment of the costs of demurrer. The other justices concurred.

CRIMINAL LAW—FUNCTIONS OF JUDGE AND JURY.

OHMS v. STATE.

Supreme Court of Wisconsin, May, 1880.

1. A person accused of crime, after verdict against him, has a right to the solemn opinion of the judge before whom the cause was tried, after a careful hearing of all that may be alleged against the justice of the verdict, that it ought to stand.

2. Where, therefore, the evidence upon which a verdict of guilty of murder in the first degree was found was not overwhelming, and the accused was unable to obtain a proper hearing of his motion for a new trial, because it was inconvenient for the trial judge (who sat in place of the judge of the circuit in which the trial was had) to remain and hear the same, and such judge erroneously supposed that the motion might properly be heard by the judge of the circuit, this court reverses the judgment, and orders a new trial, without determining whether the verdict was against the weight of evidence, or whether there was error in the instructions given to the jury.

3. The fact that the accused failing, after due effort, to get his motion heard by the trial judge, subsequently moved the judge of the circuit for the same relief, does not waive or cure the error above stated.

Error to the Circuit Court of Green County.

B. Dunwiddie, for plaintiff in error; *Alex. Wilson*, Atty. Gen., for the State.

TAYLOR, J., delivered the opinion of the court:

The plaintiff in error was tried and convicted of the murder of his father.

* * * * * * * * * *

I have made this statement of evidence tending to show the guilt of the accused, not because this court would consider itself justified in setting aside the verdict as unsupported by the evidence, nor as intimating that we would have reversed an order of the trial judge refusing to grant a new trial for the insufficiency of the evidence, but simply for the purpose of showing that the evidence is not necessarily conclusive of the guilt of the accused, and that in a case of this kind, where the consequences of a mistake are so terrible to the accused, he should have the advantage of every right which the law secures to him before his conviction should be made final. Amongst these rights, the person accused of the greatest crime known to the law has the right to have the solemn opinion of the judge who tried the cause, after a careful hearing of all that may be alleged against its justice, that it ought to stand.

The old and harsh, if not unjust, rule of the common law, which refused the right of a second trial to a person convicted of crime, either on account of mistakes made in the instructions of the trial judge, or when the evidence was conflicting or even insufficient, and which turned the accused over to the clemency of the executive power as his only remedy, when the court thought injustice had been done, has long ago been broken down in this country, and the right of the accused to demand a new trial for errors of the court on the trial, or where the conviction is not sustained by sufficient evidence, is firmly established, and in this State secured to the accused by the plain

provision of the statute (sec. 4719, Rev. Stat. 1878); and the refusal of the trial judge to hear a motion for a new trial for misdirection of the judge, or because the verdict is against the clear weight of evidence, or is not sustained by sufficient evidence, is the denial of a right which tends to the promotion of justice, and ought not to be sanctioned except in cases where it is apparent from the record there is no real foundation for the motion. Where the guilt of the accused is established by evidence which is overwhelming, this court might not consider it an error which would demand a reversal of the conviction that the trial judge refused to hear a motion for a new trial because the conviction was not sustained by the evidence, and in such a case the refusal to hear the motion would be taken as the opinion of the trial judge that the verdict ought to stand.

The record shows that immediately upon the rendition of the verdict one of the counsel for the accused notified the trial judge that he desired to move for a new trial on the judge's minutes, and requested the trial judge to give the counsel time to consult with the associate counsel, and prepare the necessary motion papers, and requested said judge to hear such motion; that the judge replied that he could not remain more than one-half hour to hear such motion, and that unless the counsel were ready with their motion within that time he could not hear it; that being unable to find his associate immediately, the counsel informed the judge that the motion papers could not be prepared within the half hour, and again requested said judge to remain and give the counsel an opportunity to prepare said papers and argue said motion. The judge replied that it was impossible for him to stay; that he was compelled to go that day back to his own circuit, and that Judge H. S. Conger would be back at this court on Tuesday, the twenty-second day of October, 1878, and that said Judge Conger would have to hear and decide the motion for a new trial, and thereupon adjourned the court until the twenty-second of October, 1878.

In explanation of this state of affairs it appears that the Hon. H. S. Conger, circuit judge of the twelfth circuit, had exchanged with the Hon. M. M. Cothren, circuit judge of the fifth circuit, and Judge Cothren had presided at the circuit court for Green county, in the twelfth circuit, upon the trial of the accused in this case, and for reasons satisfactory to himself undoubtedly, considered it impossible for him to stay to hear the motion for a new trial in the case, and supposed that it might properly be heard by the Hon. H. S. Conger on his return to his own court. In this we think the learned judge erred. When a motion for a new trial is made upon the minutes of the court it is imperative that such motion should be heard by the judge who tried the cause, unless the party who makes the motion consents that it may be heard by some other judge. It would seem impossible for a judge to intelligently determine a motion for a new trial upon the minutes of the court unless he presided at the trial. Without being present at the trial, unless a bill of exceptions or case was first settled or agreed upon containing a full history of all that took place, he could know nothing of the matters which he ought to know in order to give an opinion as to whether a new trial ought to be granted; and even upon a case or bill of exceptions made and settled he would not be in a position to give a very satisfactory opinion upon the motion. In that case he would be very much in the position in which this court finds itself when called upon under our statute relating to appeals to review the opinion of the trial judge in granting or refusing a new trial; and this court has repeatedly held that it must be a case of very gross error which will induce this court to interfere with the discretion of the trial judge in granting or refusing a new trial upon the evidence, or for other matters accruing during the trial.

The reason for this rule is so well stated by Chief Justice Dixon, in Lewellen v. Williams, 14 Wis. 687–693, cited by me in the opinion of Jones v. Railway, just announced, that I repeat it here as a better argument for the rule than I should be able to make: "The exercise of a sound discretion in such matters often depends upon a variety of facts and circumstances, which can not be described on paper, and brought before the appellate tribunal with their original force and influence, and which no one but the judge before whom the case was tried can fully and properly estimate. Many of these facts and circumstances are absolutely incapable of such delineation, and to say that the discretion depending upon them shall be transferred to another court, there to be exercised without the means of forming a correct judgment, seems impossible. This argument is equally forcible when applied to the case of hearing a motion for a new trial upon the minutes of the court, when such motion is made before a judge who did not preside at the trial. The statute regulating the trial of civil actions expressly provides that the judge before whom the issue is tried may in his discretion entertain a motion for a new trial on the minutes," etc., (sec. 2878, Rev. Stat. 1878,) and excludes the right of any other judge to hear such motion. It would seem but just that the same rule should be applied to the motion when made in a criminal action.

The impropriety of turning over the hearing a motion for a new trial upon the minutes of the court to another judge, who did not preside at the trial, is manifest also when the motion is in part founded upon erroneous rulings on the part of the presiding judge, either upon the introduction or rejection of evidence, or in his instructions to the jury. The judge, in such case, who hears the motion, has no greater powers than the judge who presided at the trial, and no appellate jurisdiction to reverse his rulings. The respect he is bound to accord to the opinions of the judge who presided at the trial would be very apt to prevent him from declaring that the presiding judge erred in his ruling or instructions. As it is said above, the accused has the right to the deliberate judgment of the trial judge that the verdict is just and ought to stand, before he shall be concluded by it.

Such is the rule in civil actions, and such is the rule in criminal actions in this State and all others where it is held that a new trial may be granted in such actions at the request of the defendant. The opinion of the trial judge is the opinion which is to prevail in such cases. The rule which prevailed in civil actions in the English courts when a motion for a new trial was made to the court in bank, upon the ground that the verdict was against the evidence, was to take the opinion of the judge who presided at the trial, and if he was dissatisfied with the verdict it was almost a matter of course to order a new trial.

We approve of the rule as laid down by the Circuit Court of the United States for the Third Circuit, in the case of U. S. v. Harding, Wall. Jr, 139. In that case the defendants had been tried for murder before Randall, the district judge, then sitting for the circuit. Harding was found guilty of murder, and Green and Williams of manslaughter. Application was made, soon after the verdict, for a new trial, and was fully argued before Judge Randall, who, after the hearing, had formed and expressed to an officer of his court (as it was offered to be proved) his opinion on this application; but just as he was about to deliver his opinion sudden illness arrested his design, and soon after terminated his life. The then circuit judge also died before any decision was given upon the motion. When the new judges were commissioned, the application for a new trial came on again. to be argued on the same reasons which had been filed originally in the cause. Judges Grier and Kane heard the argument, and Judge Kane delivered the opinion arrived at by both. In the opinion Judge Kane says: "To my mind the principle of the law is clear; the defendant, before sentence can be pronounced on him, has a right to the judicial determination of his guilt by the court as well as by the jury. If the verdict does not satisfy the conscience of the judge, the prisoner is entitled to a new trial. After the verdict is rendered the judicial discretion is still in exercise, and at any time before the sentence is recorded it may modify the punishment if the statute has not made it specific, or set aside the conviction altogether. It does not need a motion on the part of the defence; the judge himself, at the very latest moment may, *sua sponte*, award a new trial. * * * The prisoners here were entitled to the advantage of this judicial revision from the judge who sat upon the trial; and whether we will intend, *in favorem vitæ*, that he was disinclined to pronounce the capital sentence; or whether we content ourselves with an admission of the fact that the time in which this judicial discretion might be exerted had not yet expired,—we cannot affirm in either case that Judge Randall was content to enter judgment on this verdict. Even were we now satisfied what were his opinions at the time of his decease, we should be without just and legal assurance that they might not have been modified by after reflection, and before the appropriate moment for recording them." Further along in his opinion Judge Kane refers to the practice in the English courts in similar cases, and says: "I have found enough to satisfy me that where those courts are vested with a discretion as to their action on a verdict, that discretion is never exercised without unequivocal, direct, judicial knowledge of the facts disclosed on the trial." * * * At the common law, before the statutes of 2 Henry VI. c. 6, and Edw. VI. c. 7, if a prisoner had been convicted before commissioners of *oyer* and *terminer*, and a new commission issued before the award of execution, no judgment could be entered or execution ordered by their successors. 'And there was,' says Mr. Chitty, 'some reason for this restriction, for the subsequent judges were unacquainted with the circumstances of the case as developed on the trial, and might, therefore, unconsciously, be the occasion of injustice. In the case of King v. Baker, Carthew, 6, when there had been a conviction by verdict, (of speaking seditious words,) which were moved by *certiorari* into the King's Bench, it was said that that court 'never gives judgment on a conviction in another court, but the practice is, after issue joined in another court and the indictment removed, always to admit the party to waive the issue below and go to trial on an issue joined in this court;' and in that case the court directed a new trial and Baker was found guilty by a second verdict."

Judge Kane also cites the case of Warrain v. Smith, 2 Bulstrode, 136, in the King's Bench, where it is said by Coke, chief justice, referring to the case of Sutton's Hospital, "that in the Exchequer Chamber, if one of the judges die, pending the argument, and another be appointed after the argument had, he shall not give his opinion in the case." The court, without attempting to review the evidence and proceedings on the trial before the deceased judges, ordered a new trial, solely on the ground that the prisoners had the right to have the opinion of the trial judge upon the question as to whether a new trial should have been granted, and they having died before any opinion given upon the motion, the new trial was granted. Our statute for settling a bill of exceptions, in a case where the judge who tried the action dies or removes out of the State before the same is settled, is founded upon upon reasons similar in their nature to those urged for granting the new trial in the case above cited. It proceeds upon the ground that a party has the right to have his exceptions heard on appeal, and in order to preserve his exceptions on the trial he is entitled to have the presiding judge settle such exceptions, and no one else can. If, therefore, by the death or removal of the judge beyond the jurisdiction of the courts of this State, he cannot compel such judge to sign his exceptions, the court grants the party a new trial, upon his affidavit that his application is made in good faith and not for the purpose of delay, and pays the costs of the opposite party of the first trial. Sec. 2877, Rev. Stat. 1878.

From an examination of a record of the case at bar we cannot say there would have been any impropriety in granting a new trial to the accused. However powerful and conclusive of the defend-

ant's guilt the evidence might have appeared to the jury, under the influences which were brought to bear upon them at the trial, as it appears to us, in the impersonal and undemonstrative written pages of the bill of exceptions, it does not impress the mind with a certainty of the guilt of the accused. Nor can we say that the learned circuit judge who presided at the trial of this case, had he heard the motion for a new trial after the hurry and excitement of the trial had passed, and when he could have re-examined the case in a more deliberate way than could well be done in the progress of the trial, would not, in view of the enormity of the crime of which the accused was found guilty, the fearful consequence which must follow such conviction if suffered to stand, and the nature of the evidence upon which it is founded, have come to the conclusion that the verdict ought not to stand.

But without speculating on what the learned judge would or would not have done had he taken time to hear the motion, it is enough for us to know that he did not hear it, and refused to hear it, not because he thought the accused was not entitled to have it heard, but because his personal convenience would not permit him to hear it, and because, as we are bound to infer, he supposed it could with equal propriety be heard before the judge of the circuit in which the action was tried. We cannot believe that the learned circuit judge who presided at the trial of this action would have declined to give a calm and deliberate consideration to the defendant's motion for a new trial on account of any mere personal inconvenience to himself, had he not thought his rights would have been equally protected by presenting his rights to the presiding judge of the circuit. In this view of the case the learned judge was clearly mistaken. And because, by such mistake, the accused has been deprived of the deliberate judgment of the judge who presided at his trial, upon the question of whether he ought to have had a new trial, the judgment of the circuit court must be reversed.

We do not deem it necessary to pass upon the other exceptions taken by the learned counsel for the appellant, and have not considered the exceptions to the instructions given by the learned judge with that care which we would deem it our duty to give them had it been necessary to pass upon their correctness. The fact that the accused made a motion for a new trial before the judge of the circuit in which the action was tried, but who did not preside at the trial, and that such motion was made in part or in whole on the same grounds it was proposed to be made before the judge who presided at the trial, does not cure the error. The accused had done all he could do in order to get the motion heard before the proper judge, and was unable to get it so heard. Under these circumstances he had the right to make a motion for a new trial before the judge of the circuit without waiving or curing the error which had been committed against him by the refusal of the presiding judge to hear the motion.

The judgment of the circuit court is reversed, and the cause remanded for a new trial. The warden of the State prison will surrender the plaintiff in error to the sheriff of Green county, who will hold him in custody until he shall be discharged or his custody changed by due course of law.

COMMON CARRIERS—DUTIES OF RAILROADS TO EXPRESS COMPANIES.

DINSMORE v. NASHVILLE, ETC. R. CO.

United States Circuit Court, District of Kentucky, May, 1880.

A common carrier is as much bound to carry for another common carrier as it is for others. Therefore, a railroad company can not refuse to carry for an express company, nor to extend to its messengers and agents the facilities requisite to the prosecution of the express business.

On the 26th day of March, 1880, the Louisville, Cincinnati and Lexington Railway Company notified the Adams Express Company that the contract theretofore existing between the two companies for the transportation of express matter would be terminated on the 20th of April, and that thereafter the express business would be conducted over the railway company's lines by the Union Express Company, with which the railroad company had made an exclusive contract for the future conduct of the express business. A similar notice was given to the Southern Express Company by the Nashville, Chattanooga and St. Louis Railway Company, notifying the express company that its contract would be terminated on the 10th day of June, 1880.

The express companies thereupon commenced these suits to procure an injunction against the said two railroad companies, to restrain them from interfering with or disturbing the business of the express companies, and for a decree to compel the railroad companies to continue to furnish, upon their passenger trains, and at their depots and stations, the customary and needful facilities required for the proper conduct of the express business. Similar suits were commenced against the Mobile & Montgomery Railroad Company, and the Louisville, New Albany & Chicago Railway Company.

Preliminary orders were procured in all the suits, restraining the railway companies from carrying into effect their intention to exclude the Adams and the Southern Express Companies from their lines of railway, and requiring them to show cause why an injunction should not be issued continuing such restraint during the pendency of the suits.

The first application for such injunction was heard before Mr. Justice Harlan, at Indianapolis, by whom the injunction was granted as prayed. The second application came on for hearing in the above entitled suits on the 24th of May, 1880. The defendants severally produced affidavits showing that their exclusive contracts with the Union Express Company had been abandoned; that such

company had been virtually dissolved, and that the defendants were then conducting, or were about to conduct the express business over their lines in their own names and on their own account, and they severally claimed that they were legally entitled so to conduct such business, and that they could not be compelled to allow the existing express companies to participate therein or to compete therewith, or to accord to them any railway facilities or privileges whatever.

BAXTER, Circuit Judge:

The case against the Nashville, Chatannooga & St. Louis Railway will be first disposed of. We have not time to state fully and in detail all the reasons for the decree we feel bound to enter in this case. The question is both novel and interesting as well to the public as to the parties, and may be thus stated:

The Express business, as it is understood and carried on in the United States, was initiated in 1839. About that time, one Alvin Adams began the carriage of small packages of value between the cities of Boston and New York over the line of the Boston & Worcester Railroad, and the line of steamers connecting therewith, and plying between New York and Norwich. His enterprise proved remunerative. His success induced others to establish and maintain similar express lines between New York and Philadelphia, and Philadelphia and Baltimore, and other important commercial points. These all succeeded well, grew into general favor, and continued in active operation until July, 1854. At this time, by the mutual consent of the parties interested, these several express companies were consolidated and merged into the Adams Express Company, a voluntary association or partnership, which was formed and organized under authority of the laws of New York. This company, upon its organization, entered actively upon business, and prosecuted the same with unusual energy and success. It extended its operations over many of the most prominent railroads and water lines, and earned, as it justly merited, the confidence of its patrons and the general public. At the commencement of the rebellion it was doing an extensive and profitable business in the Southern States. But the exigencies of war forced a suspension of its business within the insurrectionary territory, of which exigency the complainant, the Southern Express Company, was born. The complainant is a corporation organized under and pursuant to a charter granted by the State of Georgia, and by purchase succeeded to the property, business and good will of the Adams Express Company in the Southern States. But the two companies, notwithstanding their separate existence, sustained close business relations, and agreed to the interchange of freights on terms beneficial to themselves and their customers. By this friendly cooperation and judicious interchange of business, they so far preserved their unity as to secure to their patrons all the conveniences that could have been offered by one company doing the business within the territory occupied by them both. Among other business of the Adams Express Company to which complainant succeeded, was the business which the former company was then doing over the several railroads, so far as they were then in existence, which now constitute the property of the Nashville, Chattanooga and St. Louis Railway Company, which complainant has continued to use from its organization till the present time. But it did said business under special contracts. These contracts contained stipulations reserving to the respective parties the right, upon giving the notice prescribed therein, to terminate the same.

Recently, many changes in the ownership, and consequently in the management, of railroads in Kentucky, Tennessee and contiguous States have taken place, whereby the Louisville & Nashville Railroad Company's power has been greatly augmented. The managers of this company, by leases and otherwise, have acquired control, it is said, of about four thousand miles of railroad. The bill alleges that they have recently organized the Union Express Company to transact the express business over the several railroad lines controlled by it. And that with the view of supplanting the complainant and substituting the Union Express Company as express carriers on said roads, they caused notices to be given complainant terminating the contracts under and in virtue of which complainant has been carrying over said roads. This charge, however, is denied. But if such was defendant's purpose, on being better advised, the programme has been abandoned, and defendant now concludes that it can not legally thus discriminate between express carriers; that if it carries for any, it is legally bound to carry for every one offering to do the same sort of business on the same terms.

But defendant is, it seems, determined to exclude complainant from the use of its road, and now proposes, as the only alternative left for the effectuation of its determination, to exclude all express carriers, and do the express business over its road itself. And hence the question is squarely presented: Can defendant legally refuse to carry for complainant and extend to its messengers and agents all the facilities hitherto extended to it, and undertake and do the express business over its road itself? This is the question which the facts present.

In order to obtain a correct solution thereof, let us contemplate briefly the objects for which railroads were created, and the obligations and duties imposed on them by law.

Railroads are *quasi* public institutions; they are authorized to facilitate and not to control or forde from legitimate and natural channels or hinder or obstruct the business of the country. Hence the companies organized to construct them were invested with the right of eminent domain—with the authority to condemn private property necessary to the full enjoyment of their franchises, on paying just compensation therefor. The authority to do this could only be conferred upon the theory that the public interests, which they are supposed to represent, require such seizure and appropriation. Under our government, private property

can not be taken for any other than public uses; vested rights can be made to yield only to the public necessities; railroads are held to be such necessities, and it is solely on this ground that their construction has been encouraged by liberal grants of power, and aided by private and public contributions.

As *quasi* public instrumentalities, organized to promote the public good, they are, unless plainly and constitutionally exempted from such liability, amenable to such just regulations as the legislative department may choose from time to time to prescribe. All laws deemed necessary to insure good faith in the exercise of their franchises, or to enforce an honest, impartial and efficient discharge of their legal duties and obligations, may be enacted; and, if the right has not been contracted away, the legislature may prescribe their schedule of charges, compel every necessary facility to the public and to individuals, to the extent of their means, enact police regulations, limit the speed of trains, command the use of signals, and order or inhibit the doing of any and everything expedient to advance the general interest of commerce and intercommunication, insure safety to travelers, and generally to subserve the purposes of their creation, restricted only by the constitutional limitation that vested rights are not impaired without just compensation. They are as amenable to the unwritten (as it has been judicially expounded) as to the statute law. The first and perhaps the most important of these principles, settled by judicial decisions, is that railroad companies, as common carriers, are bound to the extent of their corporate means to supply all the accommodations and facilities demanded by the regular and ordinary business of the country through which they pass. Railroad carriage has in a large measure superseded every other means of inland transportation. Everybody, whether they will or not, is forced to patronize them. And as they were created to subserve the public good and undertook to carry persons and property, they are, if able, bound to supply every facility needed for that purpose. They must keep pace with improvements in machinery, furnish easy access to and egress from their trains, stop at convenient points, for the admission and exit of passengers, make adequate provision and tender suitable cars to carry on the business offered, and generally to carry passengers and freight, and from time to time adapt their rolling stock and equipment to the varying necessities of advancing civilization and approved methods of doing business. And next in importance to this leading idea is the obligation to do exact and even-handed justice to everybody offering to do business with them. If derelict in the performance of any one of the obligations imposed by law, they may be quickened thereto by the mandatory powers of the courts, or compelled to surrender their franchises, which they thus refuse or neglect to exercise in the spirit of their several charters.

But defendants deny that any one or all of the foregoing familiar principles reach and control the question in this case. Its position, as we understand it, is that notwitstanding it is a *quasi* public instrumentality, it is also private property belonging to defendant, and that it is ready, able and willing and now offers to render to the public every service which the public has a right to demand, including the carriage of express matter, over its road, and protests that complainant has no legal right to use its road against its wishes and in the manner claimed, and by a forced use thereof enter into competition with it in the carriage and delivery of its express freight.

At first blush this position seems to be well taken but on further consideration is found to be more plausible than substantial. As a common carrier the defendant is as much bound to carry for another common carrier as it is to carry for other persons. The proposition, as it is stated, will not be controverted. Defendant can not and does not deny its obligation to carry for the complainant. Its claim is that it is only bound to carry for the complainant when complainant, like other forwarders, delivers its freight into its care and custody, to be handled, transported and delivered by it through its own agents and servants; that complainant has no legal right to demand and enforce the use of defendant's passenger trains for the purpose of carrying freight in the special keeping of its own employees, to be by them handled *in transitu*, and delivered at way stations and other places of consignment, and to have provided therefor special accommodations, such as have been heretofore supplied to it under special contract. It is upon this point the contest is to turn.

The issue is not, therefore, whether the defendant is bound to carry for the complainant, but can it be compelled to carry in the manner and with the divided responsibility proposed. Herein lies the novelty and importance of the question.

No such question could have well arisen a half a century ago, because the methods of doing business and the facilities then provided for inland transportation were not such as to raise it; but we have made wonderful progress since that time in physical as well as mental development, and no instrumentality subject to man's service has been more potential in bringing about the change than railroads. They are as potential in peace as in war. We now have about 90,000 miles of railway in the United States, which cost more than $3,000,000,000, employing not less than 400,000 persons, and yielding more than $500,000,000 of annual gross earnings.

Their rapid transit has made luxuries which, but for the facilities afforded by them, would be unknown in the interior land-locked localities of this great country, possible to the most remote sections. Tropical fruits, fish from the oceans and lakes, and oysters from the bays, are now, through the co-operative energies of the railroads and express carriers, within the reach of almost every community. These facilities making possible and suggesting corresponding changes in the methods of business, and gradually, but certainly, working changes in the habits and tastes of the masses of our people, have opened up the way for

and called express transportation into use. The duties and office of railroads and express carriers are widely different and totally distinct. The former was created to furnish motive power and to receive, carry and deliver such freights as are appropriate to such a mode of transportation. But the legislatures granting railroad charters, with perhaps few exceptions, never contemplated nor expected them to carry money, gold or silver bullion, bonds, bank-notes, deeds and other valuable papers, jewels and other small articles of great value, fruits, fresh meats, fish, oysters or other like commodities liable to rapid decay, or live animals requiring special care and attention during their transportation; nor are railroad companies authorized by their charters to receive notes, drafts or other choses in action for collection and return of proceeds, nor to receive and forward freight with the bills and charges of the forwarder attached to be collected from the assignee on delivery and returned to the shipper, and in connection with such business to afford to the public, under a single contract, and on assured responsibility, safe, reliable and speedy transportation from and to all points accessible by the use of two or more railroads; nor are railroads under their charters required to render such services. Much of the service rendered by express carriers and appropriate to their peculiar functions is not such as is by law imposed on railroads. If express carriers were ejected from the railroads, the latter could not be compelled to supply their places, and, consequently, the country would be without such facilities unless the railroad companies would exceed their corporate obligations and voluntarily undertake to do what they are not legally required to do, and to do many things which under their charters they have no right to do. As they are under no legal obligations to render such accommodations to the public, and could not be compelled to render them, they could, after ejecting the express carriers, monopolize the business, dictate oppressive rates, while affording less safety, celerity and convenience to customers as a substitute for the expeditious, reliable and necessary services of expressmen. The country would be dependent upon an illegal assumption of authority by railroads, an assumption in some respects in contravention of public policy, because it would enlarge their power and influence for controlling the business of the country, which, to say the least, is already sufficiently formidable.

But it is enough to say that railroads were not created to do an express business, are not suited to such service, possess no legal capacity to engage in it, can not be required to undertake and perform it, and, I may add, ought not to be permitted to engage in these branches of the express business, *ultra vires* their corporate powers, if they would; and, as they are not legally bound to render express facilities to the country themselves, can they, by excluding the expressmen, deprive the public altogether of this necessary facility? Or else extort such concessions as the petty resentment or cupidity of their managers might prompt them to exact? We think not.

On the contrary, if the express business, as we have hereinbefore asserted, has become a convenience to the general public, we think it the duty of all railroad companies, through their managers, and in the exercise of the trusts confided to them for the public good, to make proper provision for every body wishing to carry express matter over their respective roads, as, in doing so, they would be accommodating the public, and fulfilling to that extent, the objects and purposes of their creation.

The express business, which had its inception as herein previously stated, now extends all over the States; is carried on by numerous organizations, which meet the requirements of the several localities in which they do business; and occupies every railroad line in the country available for the purpose. They have an invested capital of over $30,000,000, and the Adams and Southern Express Companies have in daily use and occupation 21,216 miles of railroad; employ 4,297 persons; make 911 daily trips, over 64,560 miles, aggregating 19,884,420 miles of travel annually. And for the transportation of their freights they pay the railroad companies over $2,000,000 per year. It is further alleged, as showing the extent and magnitude of the express business, that these companies carried for the government $1,200,000,000 in 1878, and $661,000,000 in 1879, and for private parties, in the last-named year, the enormous sum of $1,050,000,000; and that the Adams Express Company alone receives and disburses, in New York City, 14,000 packages daily, employing therefor, in connection with their general business, 918 horses, with the necessary number of wagons.

From this summary it will be seen that the express carriage of the country is only second in importance to railroad transportation, and that the express business has so interwoven itself into the present methods that it can not be dispensed with without producing an abrupt and disastrous revulsion in the present mode of carrying on trade. It has grown into immense proportions, and has become a necessity that cannot be dispensed with. It has attained its present enlarged usefulness under the fostering case of the railroads themselves, including the defendant company. It is profitable to the railroads, and useful and convenient to the public. The right of the public to have quick, reliable, and safe carriage of goods, through expressmen, has been recognized for forty years. This general recognition by the public and by railroad corporations, in connection with its admitted utility, stamps it as a legitimate mode of railroad carriage. If legitimately within the scope of their charters, it is a legal duty imposed by law upon them. Endowed with extraordinary privileges, to enable them to fulfill the purposes of their being, they may be coerced to adapt their accommodations to the varying wants and necessities of general trade. They must keep abreast with advancing thought as well as with mechanical development. If they are under legal obliga-

tions to attach a Westinghouse air-brake or a Miller platform, as insuring greater safety to employees and passengers, they are likewise bound to adapt their facilities for transportation to the growing demands and conveniences of trade. Such requirements can work no injustice to them, and is no invasion of their vested rights. For such improved service they are entitled to compensation to the extent of the maximum allowed by their respective charters. No express carrier can lawfully demand the carriage of his goods without paying reasonable rates therefor. The carriage of such freights is in the strict line of railroad duty; it is a class of business that pays well, and such as the railroads have heretofore sought after. And if the custody of the freights is retained by the express carriers, the railroads will not be liable for anything more than the safe carriage of them. If they provide for the carrying and safely transport such freight, they will have done their full duty, and by doing this the railroads will realize the freight charges, and the expressmen will be enabled to fulfill their engagements and continue their business, keep up the continuity of their connections, and the public will be supplied with an indispensable facility, and no injury or injustice will be done to any one, unless it may be that railroad companies and railroad managers shall be deprived thereby of incidental profits and advantages to be obtained through unauthorized pursuits, and forced from the public by reason of the monopoly secured through the exclusion of lawful competition. We conclude, therefore, upon the naked obligation which the law imposes on railroad companies, and without reference to the consideration to be hereafter adverted to, that the defendant is bound to render the services demanded by the complainant, and this court, in the exercise of its judicial discretion, ought to require defendant to discharge its legal duty in this regard.

The second ground on which we think the relief prayed for may be granted, is this: Complainant and the Adams Express Companies have for more than twenty years done business over the system of roads now directly and indirectly under the control of the managers of the Louisville and Nashville Railroad Company. By energy, fidelity, and the expenditure of a large amount of money, they have succeeded in building up and establishing a lucrative business over these lines, which constitute important links, securing continuity in their operations. They have trained and reliable servants, suitable chests, safes, wagons, horses and trucks, for collecting, transferring and delivering their freights, erected permanent offices and warerooms at various stations, established rapid communication and fixed and published a schedule of charges; and have a good and profitable, steady and reliable business, and an enviable and widely-advertised reputation; all of which has been accomplished, and the rights incident thereto acquired, under the friendly auspices of those who are now seeking to deprive complainant of the use of defendant's road. If defendant possessed the legal right, which we deny, to refuse the accommodations which it has heretofore extended to the complainant, it ought not to be permitted to exercise it under the facts of this case. Defendant's long acquiescence in complainant's right to have transportation of its freight; the holding itself out for so long a time as the carrier of express matter; the encouragement it has always given to this class of business, considered in connection with the investments made and the rights of the public to such service, must, in our judgment, estop it from exerting its authority to exclude complainant, if it had any, at this time. A refusal to carry as heretofore for the complainant, would inevitably do it great pecuniary injury, dissever its connections, cause it to lose the good will of its customers and depreciate its valuable property and equipments along defendant's road—perhaps one-half. Complainant ought not to be held to be so dependent on the mercy of its adversaries and interested competitors, seeking to drive it from the field in order to insure a monopoly to themselves. Defendant responds, saying that hitherto complainant has occupied its road under and in virtue of special contracts, and it contends that complainant's enjoyment of the privileges thus granted confers nothing more than was accorded by these contracts. The position, in a qualified sense, is correct, but it is as equally correct that complainant lost nothing thereby. A farmer or other person wishing to ship one or more carloads of stock or grain, or other commodity may, with a view to convenience, specially contract for a car or cars suitable for the particular purpose, to be furnished at a specified time and place, and for such other facilities as he may need, but his doing so is no surrender of his legal rights existing independently of contracts or special agreements, to demand of a railroad company the shipment of all suitable freight tendered for the purpose. The same principle is applicable here. It was altogether proper that the complainant and defendant, in view of the magnitude of their business, should by special contract stipulate for the facilities to be furnished by the one to the other, and fix the terms and conditions upon which the business should be done, but no right arising to the complainant from public consideration or the charter obligations of the defendant, was thereby waived. These contracts were in affirmance of the pre-existing legal rights of the complainant, and an admission by the defendant that the business proposed was within the scope of its duties and reasonably remunerative. It was in the reliance upon these rights conferred by law and public considerations and thus recognized by defendant, that the complainant made the investments mentioned, and built up and established its said business, and it would be no less than a fraud upon it for the defendant to exclude it from all further use of its road, rob it of its established, extensive and profitable business, and transfer it to another or appropriate the business to itself. It will not be permitted to perpetrate such injustice.

But we do not wish to be misunderstood. The

fact that the complainant has pre-occupied the defendant's road confers no priority of right. The defendant, to the extent of its corporate authority, the Union Express Company, and all other persons or companies wishing to engage in the carrying of express matter over defendant's road, can enter upon that business on equal terms with the complainant. Neither the railroad companies nor the courts can discriminate in favor of one or more parties as against others. All are entitled to the same measure of accommodation who may offer to do the like business, and it is the duty of the courts to enforce, whenever applied to, this legal rule of impartial justice. We have no disposition to discourage or hinder any one from entering into competition with complainant. The more of them the better it will be for the railroads, as well as for the public. The railroads will thereby have more business, and the public will be better protected against exorbitant prices and the exactions of aggregated wealth and business combinations. Equal protection to all will do this. It can, however, never be attained by taking the fruit of one man's labor and giving it to another. Antagonisms between railroads and the public exist more or less in every locality, and is too often manifested in the verdicts of jurors, unjust legislation, and various other ways. This is to be regretted, but the surest way of counteracting these popular resentments is to require the railroad companies and their managers to keep within their legitimate spheres, and compel them, in good faith, to administer the trusts confided to them for the public good. This court is as ready to protect railroad companies in the full enjoyment of their franchises and against the injustice mentioned above, as it is solicitous to compel them to do their full duty to the public.

Judge Treat, of Missouri, Judge Gresham, of Indiana, and Judge Wood, of the Fifth Circuit, indicated the bent of their minds by granting restraining orders similar to the order issued in this case. I have consulted two of the district judges of this circuit who concurred in the conclusion herein announced. Mr. Justice Harlan, as I understand his recent decree, decided the same question in the same way, and the associate justice assigned to the circuit, on being requested, a few days since, to sit with me on the hearing of this motion, said that he had great confidence in the learning and accurate discrimination of Mr. Justice Harlan, and that he had no idea that he would, after investigation of the question, dissent from the decision made by the former. These intimations and concurrent views coming from so many and such high sources, have very materially strengthened the convictions which I have myself entertained in relation to the questions involved. I shall follow the ruling of Mr. Justice Harlan, and continue the restraining order until a final hearing can be had.

The same decree will be entered in the case of Adams Express Co. v. Louisville, Cincinnati & Lexington R. Co.

LUNATIC — JUDGMENT AGAINST — APPEARANCE.

STIGERS v. BRENT.

Court of Appeals of Maryland, October Term, 1878.

1. A lunatic can be sued at law for a debt which he contracted when of sound mind, and judgment therefor obtained against him. Lunacy is no sufficient ground, in equity, for declaring such a judgment a nullity.

2. A summons in an action for debt was issued against a lunatic, and it appeared that the sheriff's deputy to whom the writ was delivered for service, called at the house of the defendant named therein, and was informed he was a lunatic and could not be seen. The sheriff's deputy thereupon explained the business in hand to the wife of the lunatic, then in charge of his person, and exhibited to her the summons. She referred him to her son, by whom the lunatic's estate was managed, whom the deputy saw and to whom he showed the writ, and afterwards returned it to the sheriff with an oral statement of what he had done. The sheriff returned the writ indorsed by him "summoned." At the following trial term two attorneys appeared for the defendant. In a proceeding in equity to set aside the judgment as null and void, it was *held*, that under the circumstances, a sufficient service of the summons was shown.

3. A lunatic defendant of full age properly defends by attorney, the law presuming him of sufficient capacity for that purpose. The appearance of the defendant in obedience to its command gave the court jurisdiction over the case.

Appeal from the Circuit Court for Washington County. In equity.

This was a proceeding in equity by the appellants, as creditors of one John J. Brosius, to obtain a decree to set aside and have declared null and void a judgment by confession in favor of George Brent, the appellee, on the ground that Brosius was of unsound mind when the suit was brought; that the summons issued in the action was not served on him; that afterwards Brent procured from Brosius a power of attorney authorizing the appearance of attorneys to the suit; and that Brent committed a fraud in law against the appellants and other creditors of Brosius, in procuring the power of attorney and obtaining the judgment. Brosius and the duly appointed committee of his estate were made co-defendants with Brent.

The court below passed a decree dismissing the bill, from which the complainants appealed. The case is further stated in the opinion of the court.

BRENT, J., delivered the opinion of the court:

The bill in this case is filed by the appellants, as creditors of a certain John J. Brosius, to set aside a judgment rendered against him in favor of the appellee, George Brent, on the 12th day of February, 1877, by the circuit court for Washington county. The cause of action was two promissory notes given by John J. Brosius to the appellee for money loaned, the one, dated July 1st, 1874, being for $2,000, payable two years after date, and the other dated November 1st, 1874, being for $1,000, payable twenty months after date. Shortly after the maturity of both notes, suit was brought upon them to the November term, 1876, of the circuit court for Washington county, and judgment obtained at the following

term, which commenced in February, 1877. On the 23d of the same month of February, and eleven days after the rendition of this judgment, Clarence Brosius filed a petition on the equity side of the court for a writ *de lunatico inquirendo* against the said John J. Brosius. The writ was issued, and an inquisition taken under it and returned on the 10th of March following, the jury finding that Brosius was then a lunatic, without lucid intervals, and had been so since the 1st of August, 1875.

A large amount of testimony has been taken in the case, and the soundness of Brosius' mind at the times he borrowed the two sums of money mentioned from the appellee and executed these notes, has not been questioned or doubted. The good faith and fairness of this transaction is conceded on all sides. Nor can it be questioned that he afterwards became of unsound mind, and was so at the time the suit of the appellee was brought and the judgment in question obtained. The proof establishes these facts very conclusively. The bill does not charge any actual fraud, collusion or conspiracy, but alleges that the judgment was improperly obtained, and unless it is declared void by the court in the exercise of its equity powers, the appellee will have a preference in the distribution of the estate of Brosius, and a fraud in law will thereby be committed upon the rights of the complainants as creditors.

Three objections have been urged against the validity of this judgment. The first, that a judgment can not be rendered against a lunatic. The second, that no summons was served, and the third, that the attorneys who appeared in the case and confessed the judgment, had no sufficient authority to do so.

In this case no question arises upon the fairness or validity of the notes which are the foundation of the judgment. Their consideration was for money loaned, and they were signed and delivered by Brosius a considerable time before his mind became impaired from business troubles and lunacy supervened. The naked point is presented whether a lunatic can be sued at law for a debt which he contracted when of sound mind and a judgment therefor obtained against him. Upon this point all the authorities agree unless where some statute intervenes to prohibit it. In this State no such statute exists.

In the case of Tomlinson v. Devore, 1 G. 345, this question seems to have been for the first time presented for the decision of this court. It was there contended that a court of law had no jurisdiction to render a judgment against a lunatic, and that the exclusive control over his person and property had been given to the Court of Chancery by the Act of 1785, ch. 72, now embodied in the Code, Art. 16, under the sub-title "*Non Compos Mentis*." The case of Brasher v. Cortland, 2 John Ch. Cas. 403, was relied upon as authority, but the court in its opinion shows that the decision of Chancellor Kent in that case was made under the peculiar provisions of a statute of New York, which were not to be found embodied in our act of 1785. They sustain the jurisdiction of a court of law and held that the judgment against the lunatic was valid, and that a sale, under an execution issued upon it, passed a good title to the purchaser. Upon the validity of such a judgment, where not prohibited by some statute, they say on page 347 (1 G.), "the authorities both in this country and England are conclusive." Among the English cases we will refer only to the case of Bagster v. Earl of Portsmouth, 7 Dow. & Ry. 614. This was an action of assumpsit against a lunatic, and although the main question in the case was, whether a lunatic could contract for necessaries and whether the items charged in the account, which was the cause of action, could be considered as necessaries, yet the validity of the judgment was at issue, and it was upheld by the Court of King's Bench, all the judges concurring.

The text books are also agreed upon the point. In Freeman on Judgments, page 123, sec. 152, it is said: "While an occasional difference of opinion manifests itself in regard to the propriety and possibility of binding *femes covert* and infants by judicial proceedings, in which they were not represented by some competent authority, no such difference has been made apparent in relation to a more unfortunate and more defenseless class of persons; but by a concurrence of judicial authority, lunatics are held to be within the jurisdiction of the courts. Judgments against them, it is said, are neither void nor voidable, they can not be reversed for error on account of defendant's lunacy. * * * * In a suit against a lunatic the judgment is properly entered against him, and not against his guardian." See also Shelford on Lunatics, pages (m.) 407 and 429, and 3 Robinson's Practice, p. 240, par. 3, and English authorities there cited.

It is to be said of the case of Eckstein's Estate, Select Equity Cases by Parsons, p. 59, which was so strongly relied upon and urged on the part of the appellants, as was said by this court, in 1 Gill, of Brasher v. Cortland. It was decided upon the construction given by the court to the particular statute of Pennsylvania, which is very similar in its provisions to the statute of New York, under which the decision of Chancellor Kent was made in the case above referred to. It is clearly inapplicable, and we can not accept the decision or the reasoning of the court as an authority to govern the case before us.

We have no difficulty in reaching the conclusion, upon the objection of lunacy, that it is no sufficient ground for declaring this judgment a nullity. The jurisdiction of a court of law to render judgment against a lunatic defendant is too well settled to be now questioned, and particularly in this State, since the decision of Tomlinson v. Devore.

But it is claimed that there was no service by the sheriff of the "summons." The proof in the case does not sustain this objection. The writ is returned by the sheriff "summoned," and that indorsement upon it remains unchanged. The familiar rule of law is, "that credence is to be given to the return of the sheriff; so much so that there can be no averment against the return

in the same action." Watson on Sheriffs, p. (m.) 72. There appears to have been no step taken to have this return amended, if false, nor has the sheriff been examined as a witness to prove there was error in it. Conceding the service of the summons as testified to by the deputy sheriff was not a sufficient service, yet he says he returned the writ to the sheriff unindorsed by him, and stating to him what he had done towards serving it. The return is in the sheriff's hand-writing, and the presumption in law is in favor of its correctness. The proof in the case is not inconsistent with this presumption. The sheriff may have served it himself, and there is no proof to show that he did not, but even adopting the view of the appellants' counsel, that the only steps taken to serve the writ were those testified to by the deputy sheriff, we think all the circumstances taken together show a proper service. The defendant was a lunatic, and the deputy sheriff after going into his house and being told that he could not see Mr. Brosius on account of his condition, informed Mrs. Brosius of his business and showed her the summons, whether she read it or not he can not say; she referred him to his son, Mr. Clarence Brosius, as the person who "had been appointed his agent to attend to his business." The deputy, upon his return to town, meeting Mr. Clarence Brosius, showed the summons to him. Mrs. Brosius testified that her husband, Mr. Brosius, had remained under her charge continuously since his mental troubles began. The deputy fully informed the sheriff of what he had done, and handed the writ to him. It is afterwards regularly returned to the court indorsed by the sheriff "summoned." At the following trial term, two of the most respectable and skilful lawyers of the bar enter their appearance for the defendant, Brosius. In this there was no irregularity; a lunatic defendant of full age properly defends by attorney, and the law presumes him of sufficient capacity for that purpose. 2 Saun. Plea. and Ev. 650; 1 Tidd's Practice, 92; Shelford on Lunatics (m.) 396; Freeman on Judgments, 123, sec. 152. We thus see that a knowledge of this summons imparted to the wife of the lunatic, who had charge of him, and to the son who was managing his property, leads to the employment of counsel who appear and defend for him. This, under the circumstances, shows a sufficient service of the summons. The appearance of the defendant in obedience to its command, by attorney, gives the court full jurisdiction over the case.

We shall not inquire whether a lunatic can execute in writing a power to an attorney to appear for him and confess a judgment. That question does not arise. It is apparent that the attorneys who appeared in this case did not do so under the written power of attorney which is exhibited. The judgment differs from the terms mentioned in it. As there is no direct evidence in regard to the manner in which their employment was effected, we infer from the record that their engagement was in the usual mode and not by written power of attorney.

We have failed to discover any fatal defect or irregularity in this judgment requiring the intervention of a court of equity. There is no allegation or the slightest proof to show that it was rendered for a debt, which *ex æquo et bono*, the defendant, Brosius, was not bound to pay, or that he was deprived of making a meritorious defense, or that any such defense could be made if the judgment were now opened. The bill contains no such allegations, nor does it charge, as we have before said, any fraud, combination or conspiracy to defraud. It seems to rest upon the single allegation that the judgment of the appellee is a nullity and ought to be set aside, because rendered against a lunatic, and if permitted to stand it will work a fraud in law upon the rights of the complainants as creditors, by giving the plaintiff in it a preference over them in the distribution of the lunatic's estate.

We think the circuit court properly dismissed the bill, and the decree appealed from will be affirmed.

Decree affirmed.

ABSTRACTS OF RECENT DECISIONS.

UNITED STATES SUPREME COURT.

October Term, 1879.

MUNICIPAL BONDS — CONDITION — BONA FIDE HOLDER.—1. Certain bonds issued by the Town of Menasha were declared on their face to be valid only "where it is thereon duly certified that the conditions upon which they were voted, issued and deposited by said town have been performed." The bonds bore a certificate which merely detailed all the things required by the railroad proposition to be done and certified that all these things had been done. *Held*, that the bonds were "duly" certified. 2. The railroad proposition authorized and required the trustee-bank which held the bonds *in escrow* during construction of the railroad, to thus certify on the bonds when a certificate, signed by the chairman of the town and president of the railroad company, that these things had been done, was filed in the bank. The trustee spread on the bonds a copy of their certificate, and only certified that the original was filed in the bank. *Held*, that the trustee certified the facts themselves, in legal effect, and that his statement of what they proved was unnecessary. 3. The certificate filed in bank was signed in the name of the company by its president. *Held*, that this was the certificate of the president. 4. After the bonds were voted the company's name was changed, but the organization remained the same. *Held*, that the change of the name did not affect the validity of the bonds. 5. After the bonds were voted and before their issue, the company, under legislative authority given prior to the vote, made two consolidations with other companies. *Held*, that the bonds issued to the consolidated companies were valid. County of Scotland v. Thomas, 94 U. S. 682, and Wilson v. Salamanca, 99 U. S. 504, affirmed. The bonds in suit are valid and completely executed as commercial paper, and the buyer need not inquire into the truth of the facts certified. Anthony v. Jasper County (1880) affirmed.—*Town of Menasha v. Hazard*. In error to the Circuit Court of the United

States for the Eastern District of Wisconsin. Opinion by Mr. Chief Justice WAITE. Judgment affirmed.

CORPORATION — CONTRACT OF OFFICERS BEFORE INCORPORATION — LIABILITY — ULTRA VIRES.—1. Plaintiff, a manufacturer of machinery, was applied to by defendants, who claimed to be the prudential committee of a corporation organized under the laws of Michigan, to manufacture for and ship to the corporation certain machinery. The plaintiff accepted the order by a letter addressed to the corporation under its corporate name. A corporation had been formed, but at the time the order was given the certificate of incorporation had not been filed with the county clerk. Such filing is required by law before a corporation is authorized to commence business. The certificate was afterwards filed. The defendants at the time of giving the order had been appointed prudential committee by the shareholders of the corporation and had been authorized by such shareholders to order this machinery. *Held*, that the corporation was liable for the machinery, and the defendants individually were not, and this notwithstanding that the machinery was charged by plaintiff to defendants individually, and was so shipped to them. The agreement was originally made with the corporation, and it could not be afterwards changed by either of the parties without the consent of the other. Utley v. Donaldson, 94 U. S. 29. 2. But it is said the corporation at the date of these letters was forbidden to do any business, not having then filed its articles of association, as required by the statute. To this objection there are several answers. The corporation subsequently ratified the contract by recognizing and treating it as valid. This made it in all respects what it would have been if the requisite corporate power had existed when it was entered into. Ang. & Ames on Corp. sec. 804 and note. The corporation having assumed by entering into the contract with the plaintiff to have the requisite power, both parties are estopped to deny it. The restriction imposed by the statute is a simple inhibition. It did not declare that what was done should be void, nor was any penalty prescribed. No one but the State could object. The contract is valid as to the plaintiff and he has no right to raise the question of its invalidity. National Bank v. Mathews, 98 U. S. 621, 8 Cent. L. J. 131.—*Whitney v. Wyman.* In error to the Circuit Court of the United States for the Western District of Michigan. Opinion by Mr. Justice SWAYNE. Judgment affirmed.

SUPREME COURT OF MICHIGAN.

April, 1880.

CRIMINAL EVIDENCE — STATEMENT MADE BY PRISONER ON FORMER TRIAL ADMISSIBLE.—A being charged with larceny gave evidence for himself on the trial, testifying to certain circumstances explaining his presence at the place where the crime was committed. He was convicted, but the verdict was afterwards set aside. On the second trial his statement on the first trial was offered in evidence by the prosecution for the purpose of showing that it was false. A, on the second trial, made no statement whatever. The statement made on the first trial was admitted by the trial court. *Held*, no error. Opinion by COOLEY, J. CAMPBELL, J., dissenting.—*People v. Arnold.*

AGREEMENT TO PAY EMPLOYEES —ONE SUBSEQUENTLY EMPLOYED NOT ENTITLED TO ITS BENEFIT,—M, an employee of K, sued B on the following agreement contained in a letter from B to K: "I am told that there are some fears expressed by some of your men that they will not get their pay. You may say to them all, and show them or any of them, that we here agree to pay every man you have in your employ, to the last dollar that may be due him for labor, and stay by you until you put in your logs." M was not in the employ of K when this letter was written, but was afterwards employed by him. *Held*, that M could not claim the benefit of the promise, as properly construed it extended only to those working for K at the time it was made. Affirmed. Opinion by CAMPBELL, J.—*McDonald v. Bewick.*

FIRE INSURANCE—"VACANT AND UNOCCUPIED."—A policy of insurance was to become void if the house "should become vacant and unoccupied." Plaintiff used the premises as his own dwelling. About ten days before the fire he received a telegraphic dispatch from South Bend, Indiana, announcing that his daughter who lived there was dangerously ill, and at the point of death. He, with his wife and another daughter, at once went there, intending to return, and he did return the next day but one after the fire. A son who was not boarding at home was directed to and did visit the house daily, to look after the house and feed the stock. *Held*, that leaving the house under these circumstances was not within the condition. "There is not much authority upon this precise form of condition, but we think it must be construed as it would be usually understood by ordinary persons reading and acting on it. We think it would not convey to an ordinary mind the idea that a house is vacant or unoccupied when it has an inhabitant who intends to remain in it as his residence, and who has left it for a temporary purpose. If the phrases were used in their strict legal sense no one would imagine that the tenant was not such an occupant as would be liable to the responsibilities attached by law to occupants, or that there was such a vacancy of possession as would suspend possessory rights. It would be burglary to feloniously break and enter the house, and arson to maliciously burn it. There may be less occasion to care for a house in which no one lives than for one tenanted, but a person temporarily absent will usually take some pains to have his premises kept under oversight, and in the present case such provision was made for the domestic animals as well as for the house itself. It would, we think, be regarded as singular doctrine to hold that families leaving their houses on excursions or other temporary occasions cease to occupy them." See 67 N. Y. 260; 72 N. Y. 118. Reversed. Opinion by CAMPBELL, J.—*Stupetzki v. Transatlantic Fire Ins. Co.*

HUSBAND AND WIFE — WIFE ENTITLED TO EXCLUSIVE BENEFIT OF HER SERVICES, WHEN.—A wife may with the consent of her husband have the exclusive benefit of her services, even when performed in the family itself. Therefore, where husband and wife alternately took entire charge of the former's father, and it was agreed that the wife should receive, for her own services, compensation from the father: *Held*, that she was entitled to recover therefor. It was decided in Tillman v. Shackleton, 15 Mich. 447, approved in Rankin v. West, 25 Mich. 195, that a married woman, with the consent of her husband, might carry on business on her own account, and be protected in the result thereof against him and against his creditors to the same extent as if she were unmarried. No distinction can be drawn between services of the wife performed in and about the house and those performed elsewhere, as a foundation for a claim to recover for her own benefit. If the husband can consent to her giving her time and attention to the management of a millinery or dress-making establishment, or to any other regular business, away from her

home, and if this makes the business her own, there seems to be no conclusive reason why he may not consent to her making her services in the household available in the accumulation of independent means on her own behalf. He relinquishes her right to her services in the one case no more than in the other, and perhaps in the last case the ordinary course of marital relations is least disturbed. In Tillman v. Shackleton, *supra*, the business for which the wife was preparing was that of keeping boarders; and in Meriwether v. Smith, 44 Ga. 541, she was to give her personal labor in the cultivation of a cotton crop. In the well considered case of Peterson v. Mulford. 36 N. J. 481, the labor in the proceeds of which the wife was protected was picking berries, boarding children, selling milk, butter, eggs, etc. These cases were well decided and can not be distinguished from the present. They are all the logical results of the statute, which empowers a married woman to hold, sell, mortgage, convey, devise and bequeath, as any other person may, any property to which she may become entitled "by gift, grant, inheritance, devise, or in any other manner." Reversed. Opinion by COOLEY, J.—*Mason v. Dunbar.*

SUPREME COURT OF IOWA.

April, 1880.

ELECTION — PROMISE OF CANDIDATE TO PAY MONEY INTO TREASURY A BRIBE WHEN.—A promise by a candidate to pay into the public treasury, if elected, a part or all of his compensation is, within the meaning of the statute, an offer of a bribe to an elector that will disqualify the former from holding the office. Opinion by ADAMS, J.—*Carrothers v. Russell.*

SECONDARY EVIDENCE — CONTENTS OF LETTERS WHEN NOT ADMISSIBLE— SEARCH NECESSARY.—A witness for the defendants testified that he had received certain letters from the plaintiff in relation to matters in controversy, and that he "had looked for the letters and could not find them; was not requested to look for them; think they were destroyed;" and on cross-examination he stated that he did not know that he had made a thorough examination for said letters. Against the objection of the plaintiff, the defendants were allowed to prove the contents of said letters. *Held*, error. It does not appear that the witness examined or looked in any place where said letters would likely be found or where usually kept. He did not know they had been destroyed, and he in substance only stated that he did not know where they were. This is not sufficient. 1 Greenl. Ev. sec. 558; Horseman v. Todhunter, 12 Iowa, 230. Reversed. Opinion by SEEVERS, J.—*Howe Machine Co. v. Stiles.*

SUPREME COURT OF MISSOURI.

May Term, 1880.

CRIMINAL PROCEDURE—VERDICT NOT SUPPORTED BY EVIDENCE— WHEN SUPREME COURT WILL INTERFERE.—Defendant was found guilty of an assault upon one Hoffstetter, and doing him great bodily harm by shooting him with a pistol. Hoffstetter and one Reichisth testified positively that defendant did the shooting. On the other side Musick, Patton, Geiger, Kain and Rosenthal testified that defendant did not, but that Patton did the shooting. The only ground relied on for a reversal was that the verdict was against the evidence. *Held*, that it is only when there is a total absence of evidence, or it fails so completely to support the verdict that the necessary inference is that the jury must have acted from prejudice or partiality, that the Supreme Court will attempt to relieve for that reason, even in a criminal case. State v. Cook, 58 Mo. 546. In this case there was positive evidence to support the verdict, and while the preponderance seems to be on the side of the accused, the jury could best determine its weight and credibility. This court can not say that, because the witnesses were most numerous on one side, they were entitled to more credit than those on the other side. Affirmed. Opinion by HENRY, J.—*State v. Musick.*

EXECUTIONS— EXEMPTIONS — LAWYERS' LIBRARIES.—Plaintiff, a lawyer, sued defendant, an officer, for seizing certain law books, under an execution against plaintiff, which books he claimed as exempt from the execution. Plaintiff, when the defendant proposed to make the levy, declined to select any portion of the library as exempt, but claimed the whole, without regard to value, as exempt. The point involved was, whether a lawyer, being the head of a family, could select and hold exempt, in place of other property, such books as in his judgment were necessary to his profession, without regard to their value, under 1 W. S. 603, sec. 9, now Rev. Stat. sec. 2343. The judgment below was for the defendant. *Held*, that, under a proper construction of this section, a lawyer, being the head of a family, may select such books as may be necessary to his profession, but such books being selected in lieu of other property, which the same section previously exempts, should not exceed in value the other property in lieu of which they are selected. And when, as in this case, the execution debtor refuses to select such books as are necessary, but claims the whole of a valuable library, and all his other property, as exempt, this is not such a selection as the statute requires, and the officer can not be held liable for levying on sufficient of said books to satisfy the execution. Nor was it necessary for the officer to go through the idle ceremony of apprising plaintiff of his rights when it was apparent that he was sufficiently aware of them. Affirmed. Opinion by SHERWOOD, C. J.—*Brown v. Hoffmeister.*

QUERIES AND ANSWERS.

QUERIES.

44. A and B were lawfully married prior to 1861. B (being the husband) afterwards went into the army and was reported killed. The wife had reports of the killing from a brother of B and pretended eye witness. In about two years after, A, in good faith, married C, and by him had children. She afterwards learned that B was still alive, but she continued as C's wife. B has since died. Query. Can A claim dower in lands in Missouri owned by B in his lifetime to which she had not released her right of dower? Both marriages took place in Missouri.

C.

45. The charter of a manufacturing company provides that each and every shareholder of the company shall be individually liable to the extent of par value of his shares for all debts of company contracted during the time he was such shareholder, provided such debt was to be paid within one year from the time it was contracted and suit for collection of same shall be brought within one year after the debt became due. B took promissory note of company, payable sixty days after date. When note became due company took it up by

issuing to B its new note payable sixty days after date of renewal, and in like manner each renewal note was taken up as it became due, until a period of more than three years had elapsed from date of first note. The last renewal remains due and unpaid. Does last renewal note constitute "a debt to be paid within one year from the time it was contracted," for which those who were stockholders at time when it was issued are liable, provided suit shall be brought thereon within one year after it became due and execution shall be returned unsatisfied? X.

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46. A farmer sold to B the grass growing on the meadow of the former, with the agreement by B that he will remove the hay on or before September first. B cuts and stacks the hay in the meadow, and does not remove it at the agreed time. After notice to B of his intention to do so, the owner of the land depastured his meadow, whereby his cattle eat and destroyed the hay stacks, they being unfenced. Has B an action against the owner of the cattle? D. L. A.
Sherburne, N. Y.

ANSWERS.

30. [10 Cent. L. J. 378.] A person owning property exempt from execution, may sell or mortgage the same as he pleases. His mortgaging such exempt property to secure one creditor, is not a waiver of his exemption as to any other creditor. Collett v. Jones, 2 B. Mon. 19; Vaughn v. Thompson, 17 Ill. 78; Hill v. Johnson, 29 Pa. St. 362; Frost v. Mott, 34 N. Y. 253; Jones v. Scott, 10 Kas. 33; Moseley v. Anderson, 4 Miss. 49; Smith v. Allen, 39 Miss. 469; Frost v. Shaw, 3 Ohio St. 270; Thompson on Homesteads, etc., § 408-410; 19 Am. L. Reg. (N. S.) 24, and cases cited in note. But if the equity of redemption in exempt property mortgaged could be sold (it could not unless by statute so providing), the purchaser would be treated as an assignee of the mortgage, and the exemption restored by payment of the mortgage debt. D. L. A.
Sherburne, N. Y.

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30. [10 Cent. L. J. 378.] A party in contracting is presumed to do so with reference to the existing laws. If he mortgages property and the statute authorized the equity of redemption to be sold; upon default the mortgagee forecloses, and the property and the equity of redemption are sold, it would seem clear that the purchaser of the equity of redemption could pay off the mortgage and thus obtain a good title to the property. The mortgagor would be estopped from setting up a claim to his exemptions against such purchaser, because the purchaser is in direct privity with the mortgagee to whom the mortgagor had by the mortgage waived his exemptions. B. B. BOONE.
Mobile, Ala.

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33. [10 Cent. L. J. 398.] Yes. B was a factor. Story on Agency, § 33. The act of B in pledging the goods left with him for sale was wrongful and a conversion. A factor can not pledge the goods of his principal for his own debt. Nor can he dispose of them only by way of a sale in the usual course of trade. If he attempts to pledge for his own debt no title passes, and the owner may reclaim from the pledgee, and the good faith of C does not alter the rule. Boyson v. Coles, 6 M. & S. 14; Easton v. Clark, 35 N. Y. 225; Laverty v. Suethen, 68 N. Y. 522; Story on Ag., §§ 113, 229, 225, and many authorities there cited. A *bona fide* purchaser of property (not negotiable paper) although from one in possession, can acquire no better title than the vendor has to transfer. Ballard v. Burgell, 40 N. Y. 314; Hart v. Carpenter, 24 Conn. 427; Bradshaw v. Wamer, 54 Ind. 58; Aultman v. Mallory, 25 Am. (5 Neb.) 478; Mosely v. Shattuck, 43 Iowa, 540. These are all cases of sales with conditions that title should remain in vendor until happening of some event, but they establish the rule that possession in a vendor or a pledgor, and good faith in the vendee or pledgee, can not divest the real owner of his property.
Sherburne, N. Y. D. L. A.

CURRENT TOPICS.

Another Chinese case involving a number of novel questions, has recently been decided in the United States Circuit Court for the District of California. In *re Wong Yung Quy*, 5 Pac. L. J. 359, a statute of California made it an offense to disinter or remove from the place of burial the remains of any deceased person without a permit, for which a fee of $10 was levied, and in default of whose payment the person so removing the dead body was punishable by imprisonment. SAWYER, J. HOFFMAN, J. concurring held the statute constitutional. 1. It does not violate that article of the Federal Constitution providing that Congress shall have power to regulate commerce with foreign nations, because the act deals with matters wholly within the State—within its territory—with the remains of parties who have lived and died within its jurisdiction, and which have been buried and which still remain buried in its soil; and professedly and apparently for sanitary purposes. The fact that the Chinese exhume and transport to their own country the remains of all or nearly all their dead (amounting to more than ninety per cent. of all such removals), while other aliens and citizens comparatively but rarely perform these acts, only shows that this generality of practice requires more rigid regulations and more careful scrutiny, in order to guard against infections and other sanitary inconveniences, than would otherwise be required. 2. Nor does it violate that section of the Constitution providing that no State shall lay any impost or duties on exports. There is no property in a dead body, and the remains of deceased persons are not "exports." 3. There is no violation of the Fourteenth Amendment. There is no discrimination against or in favor of any class of residents. It operates upon aliens of all nationalities and upon all citizens alike. It applies to all cases of remains to be removed beyond the boundaries of the country, whether to foreign countries, to other States, or to other parts of this State. And there are no restrictions upon disinterments and removals of Chinese dead to other places within the same county for burial not applicable to citizens and all other aliens. 4. There is nothing in the provision in question in conflict with Article IV. of the Burlingame Treaty, which provides that "Chinese subjects of the United States shall enjoy entire liberty of conscience, and shall be free from all disabilities or persecutions on account of their religious faith or worship." Conceding that the religious sentiment of the Chinese requires that they shall remove the remains of their deceased friends to China for final burial, there is nothing in the provision forbidding or unduly obstructing the performance of that rite or religious duty, and nothing that does not equally apply to other aliens and citizens.

The judgment of Lord Coleridge in the case of *Leutner v. Merfield*, says the *Law Times*, raising the question of privilege in actions for defamation of character, has been affirmed by the Court of Appeal. The action was brought by the plaintiff in respect of certain statements made by the defendant with reference to the plaintiff. There was no evidence that the defendant did not believe those statements to be true, or that he had cause to believe them untrue. The judgment of Lord Coleridge was based upon such cases as Coxhead v. Richards, 2 C. B. 569. In that case two of the learned judges expressed the opinion that, if a defamatory communication was made to a third party without previous inquiry, and it was of importance to the interests of that party that such communication should be made, it was privileged if made *bona fide*

in the reasonable belief that it was true. The said two judges who formed the court were of opinion that, where there was no relation between the parties which created a duty to make the defamatory communication, and it was not required for the interest of the person who made it, the importance of it to a third party to whom it was made would not confer any privilege upon it, if made voluntarily, and not in answer to any inquiry. The plaintiff in *Leutner v. Merfield*. appealed from the judgment of the Common Pleas Division, but without avail. Lord Justice Brett was clear that the occasion was privileged, for when a party interested asked for information or advice on a certain matter in which he was interested, that was a privileged occasion. In the present case the communication was in answer to inquiries by a party interested in the subject-matter of inquiry. So the other lords justices thought. Lord Justice Cotton intimated that, when a person having an interest in the truth or falsehood of a matter, made inquiry of another respecting it, that was a privileged occasion, and the answer was privileged unless there was evidence of malice.

RECENT LEGAL LITERATURE.

THOMPSON ON NEGLIGENCE.

No one can properly appreciate this work without examining it for himself. The number of topics treated, embracing the whole field of negligence independent of contract, the number of cases reported in full, each one a leading case on its subject, the variety of the notes, each one a treatise in itself, the number of cases cited, including every adjudication, both English and American, from the earliest English case to the last one reported in a law journal—these can be told to the practitioner, but their real meaning can only be learned as the inquirer turns over its 1600 pages of contents.

The work is in two large volumes. The first chapter treats of the grounds of actionable negligence, the liability for failure to restrain noxious agents. Five leading cases are given to illustrate this subject; the celebrated English case of Rylands v. Fletcher; the case of Parrot v. Wells, on the liability of a carrier for injuries to adjacent property, caused by explosion of nitro-glycerine, determined by the Supreme Court of the United States in 1872; the New York case of Losee v. Buchanan, concerning the liability for the explosion of a steam boiler; the New Hampshire case of Brown v. Collins, upon the liability of a traveler for damage caused by his horse escaping from his control; and Hay v. Cohoes Company, 2 N. Y. 159, and Tremain v. Cohoes Company, 2 N. Y. 183, in which the liability of a proprietor for damages to adjacent property, caused by blasting rock, was considered. Following these cases come Mr. Thompson's notes, showing the application of the rule in Fletcher v. Rylands to subsequent English cases, and the limitations which it has received in others, Nichols v. Marshland, 4 Cent. L. J. 319, and Box v. Jubb, 27 W. R. 415, for example. The value of Fletcher v. Rylands as an authority is then discussed, and its relation to the doctrine of the American courts pointed out. The other leading cases next receive their share of attention from the author, and, after a perusal of thirty-eight pages of notes, the second chapter is reached. The second chapter is devoted entirely to the liability for damages caused by fire. Three cases are set out in full; Dean v. McCarthy, a Canadian case, on the liability of one setting out fires on his own land. The other two, on account of the greater prominence which railroads have involuntarily taken in actions of this character, are properly cases in which the liability of that class of corporations has been under discussion. They are the case of Vaughan v. Taff Vale R. Co., 3 H. & N. 742, 5 H. & N. 678, and the no less admirable judgment of the Supreme Court of Illinois in Fent v. Toledo etc. R. Co., 59 Ill. 349, in which Lawrence, C. J., laid down a doctrine at once just and practicable, and one which the courts of England and of the States, with the exception of New York and Pennsylvania, have approved. The notes to this chapter cover twenty-five pages. The third chapter treats of the liability for injuries committed by animals, the leading cases being four in number: May v. Burdett, 9 Q. B. 101; Earl v. Van Alstine, 8 Barb. 630; Van Leuven v. Lyke, 13 Johns. 339; and Loomis v. Terry, 17 Wend. 496. Following these are the annotations, covering twenty-seven pages. Chapter four is upon a topic of much interest, the legal responsibility for vending, shipping or letting dangerous goods or machines, the leading case being that of Thomas v. Winchester, 6 N. Y. 397, where it was ruled by the New York Court of Appeals, in 1852, that a dealer in drugs who carelessly labels a deadly poison as a harmless medicine, and sends it so labelled into the market, is liable to all persons injured thereby. The annotations to this chapter are as full as the adjudications on this subject permit. Chapter five on the negligent use of fire arms sets out in full the case of Morgan v. Cox, 22 Mo. 373, and a note of seven pages; chapter six on the liability for removing the support of land, the cases of Panton v. Holland, 17 Johns. 92; Gilmore v. Driscoll, 122 Mass. 199; Humphries v. Brogden, 12 Q. B. 739, and a note covering ten pages. The seventh chapter discusses the liability for defects in real property injuring persons or animals coming upon premises, the English case of Indemaur v. Dawes is given in full; the annotating is more elaborate, not less than twenty-seven pages being covered by the notes. In the eighth the liability for obstructing or endangering travel on highways is illustrated by three leading cases, the adjudications set out and the principles stated in twenty-three pages of notes. The ninth chapter is entitled the Law of the Road, and embraces three leading cases and eleven pages of notes. The tenth, eleventh and twelfth chapters are in their topics somewhat similar—they treat of collisions between travelers and horse railways; between travelers and railway trains, and injuries to persons on railway tracks at other places than at highway crossings. Seven cases in all are devoted to these subjects, the annotations particularly on the last division being very elaborate. The thirteenth chapter presents a fertile field of litigation against railroad corporations, their liability for injuries to domestic animals. The author's notes to this chapter extend over nearly fifty pages. In the fifteenth chapter the negligence of private corporations owning public works, and in the sixteenth the negligence of counties, of incorporated public boards and other *quasi* municipal corporations is discussed, three cases being set out in full, and the notes being, as usual, instructive and complete.

This concludes the first volume. It was our intention, in order to give the reader some slight idea of the diversity of the topics in this great work, and the elaborate and thorough treatment which they have

. The Law of Negligence in Relations not Resting in Contract, Illustrated by Leading Cases and Notes. By Seymour D. Thompson, author of "Liability of Stockholders," "Homesteads and Exemptions," "Cases on Self-Defense." In two volumes. St. Louis: F. H. Thomas & Co. 1880.

received, at the hands of the learned author, to go through the two volumes in the manner just indicated. But our space compels us to stop when but half way through the work, and permits us to give the subjects of the chapters of the second volume only. Briefly they are, the liability of municipal corporations, of public officers and of telegraph companies for negligence; respondeat superior; liability of master to servant; personal liability of servant for negligence; proximate and remote cause; contributory negligence; remedies; procedure and damages.

We have said that the work contains 1,600 pages, but of this at least one-half is printed in small type, so that the amount of matter in it might well be represented by four of the ordinary sized text books. Sixty eight cases are reported in full, and no less than 5,700 are cited and discussed. The table of cases which covers 178 pages gives a complete history of the value of each case cited, by showing the other cases in which it has been referred to, overruled, distinguished or denied. This portion of the book alone would make a volume, and a decidedly useful one, of itself. The whole work is, in our opinion, the most considerable legal text-book which has of late come from the pen of a single author. Considered as a treatise, which the notes really are, there is no recent law book, American or English, which can be said to be its superior; considered as a volume of annotated leading cases, it excels the volumes of Smith and White and Tudor in everything except the extent of the field which it occupies. It is a credit to the author, whose reputation as a legal writer has been already assured. It is more: it is an honor to American literature.

JACOB'S FISHER'S DIGEST.

The third volume of Mr. Jacob's new edition of Fisher and Harrison's digests, including the annuals, brings the work down to the title, Entry. It contains some of the most important branches in the law. For example the title, Criminal Law, covers 420 pages; Defamation 60 pages, and Election nearly the same. This valuable enterprise is progressing with reasonable rapidity, and is certain of the support of a profession, to whom a complete digest of the English decision is second only in importance to the United States Digest.

NOTES.

——We are glad to note the fact that the Republican candidates for the Presidency and Vice-Presidency belong to our profession. General James A. Garfield was admitted to the bar in 1856. General Chester A. Arthur's appearance in the famous Lemmon Case early gave him a national reputation. Latterly, however, in the case of both the candidates, the law has been forsaken for politics, and neither can be said to be representatives of the American bar at the present day.

——Chief Justice Cockburn, of England, in a recent letter to the Attorney-General criticising certain provisions in the new English Code, says: "For the same reason that, in dealing with blasphemy, I insisted on something more definite than the mere name of the offense, the same objection presents itself when in sec. 143 we have to deal with "obscenity;" the term, though it has been used in one or two acts of Parliament, being much too vague and uncertain, and affording too wide a scope for individual and arbitrary interpretation. Many persons may think, for instance, that the nude in art—a naked Venus, or other form of pictorial nakedness—should be excluded as indecent or obscene. But it is not because a book or print may be deemed obscene, that its publication should be prohibited or punished. It is only in so far as it tends to corrupt the morals by inflaming the passions and exciting to immoral conduct, that such a publication becomes an offense against public order. The tendency to corrupt the public morals should therefore be made the test of illegality."

——Whoever prepares the *syllabi* to the cases reported in the *Southern Law Journal and Reporter*, is bound to be rhetorical even if he can not be exact. The case of *State v. Staley*, recently decided by the Supreme Court of Tennessee, appears in the issue of that publication for May. The second paragraph of the *syllabus* is as follows: "The day for escaping the consequences of crime on mere technicalities, not going to the protection of essential right, has gone by, and the violators of law had as well accept the fact and act accordingly." What the case did, in fact, decide, was that in an indictment for selling liquor within four miles of a place of learning, the name of the person to whom the liquor was sold was not material.——In a rape case in Washington City last week, while the prisoner's counsel was cross-examining the girl, one of the jurors arose in the box and asked the court to check the counsel, saying: "This woman ought not to be crucified twice." The prisoner's counsel made a sharp rejoinder and the matter dropped. Shortly afterwards, when the counsel was pressing the witness to answer some very delicate questions, the juror again arose, and said "that the examination was not conducted properly, the witness was treated roughly and there was not the same delicacy shown and observed as was shown in a recent case in this court." The prisoner's counsel asked for the discharge of the juror and several of the jurors seconded the motion, alleging that they would not be able to agree. The court, however, decided to proceed, and the juror who desired to instruct the counsel how to cross-examine, was permitted to remain in the box, after stating that he had not made up his mind upon the case.——A meeting of the Executive Committee of the Illinois State Bar Association has been called for Tuesday, June 8, at Springfield.——The English Court of Appeal have recently held (Methall v. Vining, 28 W. R. 330), that in questions regarding the piracy of a trade-mark, the color of the marks can not be taken into account but that the plaintiff must prove his case from a comparison of the uncolored (i. e. black and white) diagrams. And in *ex parte* Moner, 28 W. R. 236, JAMES, L. J., adds to legal terminology by speaking of a "bonamee account" that is an account put by one man in another's name, merely for his own convenience. The reference evidently is to the good turn one good friend (*bon ami*) does to another. For this information we are indebted to the *Canada Law Journal*.

An Analytical Digest of the Law and Practice of the Courts of Common Law, Divorce, Probate, Admiralty and Bankruptcy, and of the High Court of Justice and the Court of Appeal of England, comprising the reported cases from 1756 to 1878, with references to the rules and statutes. Founded on the Digests of Harrison and Fisher. By Ephraim A. Jacob, of the New York Bar. Volume III., containing the titles, Criminal Law—Entry. New York: George S. Diossy. 1880.

ST. LOUIS, JUNE 11, 1880.—No. 2.

The price of this addendum is one dollar per year, to subscribers of the Central Law Journal only. It is not issued every week, but as often only as there are sufficient opinions filed to fill one sheet. Subscribers who have already paid their subscription to the JOURNAL *may obtain it for the remainder of this year by remitting sixty cents. Remittances may be made in three cent postage stamps.*

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SUPREME COURT OF INDIANA.

May Term, 1880.

POWERS OF COUNTY COMMISSIONERS — ULTRA VIRES.—Boards of county commissioners have no power to employ attorneys to prepare indictments and conduct criminal prosecutions, and a county can not be compelled to pay for services rendered under such employment. Hight v. Commrs. Monroe County, not reported. Reversed. Opinion by SCOTT, J. — *Commrs. of Ripley Co. v. Ward.*

COVENANT OF WARRANTY — RIGHT OF GRANTEE TO PAY OFF LIENS.—A grantee of real estate under a deed containing full covenants of warranty, in the absence of any contract to the contrary, has a clear right to extinguish and satisfy all prior and apparent liens on the land conveyed to him. He may do this with the unpaid purchase money still owing by him to his grantor, or if none is owing he may pay and satisfy such liens out of his own means, and having done so would be entitled to recover the amount so paid from his grantor under the covenants in the deed. 10 Ind. 424; 44 Ind. 452. Reversed. Opinion by HOWK, J.—*Dunkelbarger v. Whitehall.*

DURESS—IMPROPER PRESSURE—MORTGAGE.—The threat of a husband to abandon his wife if she does not execute a mortgage on her separate real estate to secure his debt is an improper pressure, and such a mortgage may be avoided by her, if the threat induced the execution of the mortgage and was made with the knowledge and consent of the mortgagee, or if the mortgagee knew at the time of the execution of the mortgage that it was executed by reason of such threat of the husband. In a suit to foreclose the mortgage by an assignee, an answer of the wife setting up the threat, to be good, must allege that the mortgagee participated in the duress complained of, or knew of the threat. Reversed. Opinion by SCOTT, J.—*Line v. Blizzard.*

MORTGAGE SECURING NEGOTIABLE NOTES — RIGHTS OF INDORSEE.—A mortgage is a mere security for a debt or obligation, which is considered the principal thing and the mortgage only as the accessory. The legal title vests in the mortgagee simply for the protection of his interest and in order to give him the full benefit of the security; but for other purposes the mortgage is a mere security for the debt. 32 Ind. 497; 24 Ind. 208; Jones on Mort. § 11. In this State, therefore, the indorsee of a negotiable note secured by mortgage takes the mortgage discharged from all the equities to which the note may have been subject in the hands of the payee to the same extent as the note itself is discharged from such equities. In that respect the indorsee takes the mortgage as he takes the note. 16 Wall. 271; 62 Mo. 455. Affirmed. Opinion by NIBLACK, J.—*Gabbert v. Schwartz.*

ARBITRATION — COPY OF AWARD — WAIVER. — Where three cases were referred to arbitration, in a suit on the arbitrators' bond, the defendants can not set up the fact that one of the cases was not decided, to defeat the award in the other two cases. Where such bond provided that the award should be sealed up and returned into court nearly two months after the submission of the cause, such provision is incompatible with the right of defendants under the statute to a copy of the award and notice thereof within fifteen days after it is signed by the arbitrators, and such copy and notice must be held as waived. As to the answer of surety in such case, see Spencer v. Curtis, 57 Ind. 221. Affirmed. Opinion by BIDDLE, C. J.—*Marsh v. Curtis.*

EVIDENCE—PRESUMPTION OF JURISDICTION.—1. In an action to recover the possession of real estate, a deed, the certificate of the recorder that it had been recorded, and his certificate that it had been re-recorded, stating the dates, were given in evidence and read to the jury without objection. *Held*, that objections to the competency of the recorder's certificate as evidence were waived, and if there was no evidence contradicting the certificates, the jury could find that the deed had been recorded and re-recorded as therein certified. 2. The Knox circuit court being a court of general jurisdiction the jurisdiction in any given case must be presumed, unless it otherwise appears upon the face of the record. 9 Ind. 394; 25 Ind. 380; 57 Ind. 339; 60 Ind. 226. 3. Questions in a case not discussed by counsel will be regarded as waived. Affirmed. Opinion by BIDDLE, C. J.—*Hyatt v. Cochran.*

SEDUCTION— EVIDENCE — BIRTH OF CHILD.—In an action for seduction the woman can not be asked on cross-examination, for the purpose of showing her bad character, whether she has not had criminal intercourse with other men; nor for the purpose of impeaching her if she deny it. 13 Ind. 46; 5 Waite's Actions and Def., 667; 1 Greenl. Ev. § 458; 44 Pa. St. 452. But when the complaint shows that a child was born as the result of the seduction, the fact of such birth could not fail to be considered by a jury in estimating the damages the plaintiff would be entitled to for the seduction. Indeed it would be a very proper element to consider in assessing the damages. In such a case it would be competent therefore, on cross-examination, to ask the plaintiff whether she had not had sexual intercourse with a certain other person or persons, at or about the date of her alleged seduction. The question whether the defendant is the father of the child must be tested in the same manner as in prosecutions for bastardy. Reversed. Opinion by WORDEN, J.—*Smith v. Yaryan.*

CONTRACT — CONSTRUCTION OF — PAYMENT.—In 1871, A was the owner of a town lot and it was agreed between him and his son B that they should build a house on the lot, and that when B had paid one-half of the cost of house he was to have one-half of it. B took possession, the improvements were made, and B lived in the house until 1875, when he died, and his widow and children lived in it since that time. It appeared that one R was employed in the building of the house, that G held a note against him for $100, and that there was an agreement between B and R, that if the former would get said note and deliver it to the latter he would accept it in part payment for his work. B obtained the note by executing to G another note with his father as surety, which note he paid with money borrowed from L, upon a note with his father and mother as sureties, his father paying the latter note. *Held*, in a suit by A to recover the lot, that the agreement that B was to have one-half of the house when he had paid one-half of the cost of the same, implied that he was to have also one-half of the lot. *Held*, also, that B paid said $100 to R, and was entitled to credit for the same in determining the amounts respectively paid by A and B. The evidence of the giving of the note to L and of its payment by A was incompetent. Reversed. Opinion by WORDEN, J.—*Gerdone v. Gerdone.*

PLEADING — SEPARATE PARAGRAPHS OF COMPLAINT — WARRANTY — EVICTION. — 1. When the grantee in a general warranty deed brings an action to recover damages for an alleged breach of two or more of the covenants in his deed, it is not necessary to state the alleged breaches in separate paragraphs, and when several breaches have been stated in a single paragraph the sufficiency of each may be separately tested by a demurrer thereto in the same manner as if such breach had been pleaded in a separate paragraph. 24 Ind. 56; 47 Ind. 310. 2. A covenant against incumbrances in a warranty deed only extends to actual incumbrances; but where the complaint for a breach of such covenant contains allegations showing that such incumbrance existed at the date of the deed, it is sufficient to withstand a demurrer, and if the allegation is not true, this may be shown by the evidence, or failure of evidence, on the trial. In such a case, where it was alleged that a mortgage executed by a third person existed upon the lot at the date of the deed, and the evidence showed that the plaintiff had bought no house with the lot, but that the mortgage was executed by a tenant living upon the land under a lease from the defendant, the grantor, who had the legal title, and that such tenant under his lease had not the right to remove from the lot a house which he had moved thereon, and upon which only he could give a valid mortgage, the allegation as to incumbrance was not sustained. 3. Where, in such a suit, the plaintiff claims to have been evicted by yielding to a paramount title, he must show not only that he yielded possession to what he supposed was a paramount title, but that the title to which he yielded was in fact paramount to that of any one else to the property. 14 Ind. 311; 18 Ind. 425; 47 Ind. 256. Reversed. Opinion by HOWK, J.—*Sheets v. Longlois.*

PLEADING—CROSS-COMPLAINT — COUNTERCLAIM.—What is now in this State commonly called a cross-complaint is practically synonomous with a cross-bill in chancery and is, under our present code, technically a counterclaim. A counterclaim is any matter arising out of or connected with the cause of action, which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages. The circuit courts have now a probate jurisdiction which is separate and distinct from their jurisdiction in ordinary civil actions, and all matters falling within their probate jurisdiction are required to be entered and kept in books prepared and separately set apart for that purpose. 55 Ind. 528; 48 Ind. 559. In this case the original complaint constituted an action for partition, to be placed on the docket as a civil action, and to be entered upon the records pertaining to the ordinary civil jurisdiction of the court. The cross-complaint brought an element into the cause wholly inconsistent with the nature and purposes of the original action, and was addressed to the probate jurisdiction of the court, invoking an order which could only be properly entered on the records set apart and kept for probate business. This involved a commingling of jurisdictions and an incongruity in judicial proceedings not contemplated by the statute authorizing counterclaims and not supported by any of the analogies in chancery proceedings. The cross-complaint did not, therefore, make out a proper counterclaim. Reversed. Opinion by NIBLACK, J.—*Douthitt v. Smith.*